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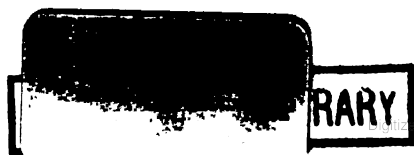
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**REPORTS**  
**OF**  
**Cases Heard and Determined**  
**BY THE**  
**SUPREME COURT**  
**OF**  
**SOUTH CAROLINA**

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**VOLUME XCVII.**

**CONTAINING CASES OF NOVEMBER TERM, 1913, AND APRIL  
TERM, 1914.**

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**W. H. TOWNSEND,**  
**SUPREME COURT REPORTER.**

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**Columbia, S. C.**  
**The R. L. Bryan Company, Publishers.**  
**1914.**



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OCT 28 1914

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DURING THE PERIOD COMPRISED IN THIS VOLUME.

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ULYSSES R. BROOKS.

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<sup>1</sup>Commissioned, January 15, 1914.

<sup>2</sup>Commissioned, to take effect May 1, 1914.

## Acknowledgment.

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W. H. TOWNSEND,  
Supreme Court Reporter.

Columbia, S. C., June 26th, 1914.

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## Cases Reported in this Volume.

---

American Baptist H. M. Society, Corley v.....	460
American Central Ins. Co., Rawls v.....	189
Anderson v. Citizens Bank.....	453
Arnold, Phila. Life Ins. Co. v.....	418
Arthurs, So. States Phos. Co. v.....	358
Atlanta & C. A. L. Ry. Co., Muckenfuss v.....	46
Atlantic Coast Line R. R. Co., Cannon v.....	233
Watkins v.....	148
Augusta-Aiken Ry. Co., Kirkland v.....	61
Ayer v. Hughes.....	255
 Baker, Cannon v.....	116
Banks v. Frith.....	362
Bennett v. Spartanburg etc. Ry.....	27
Bethea v. W. U. Tel. Co.....	385
Blease, et al., Tucker v.....	303
Boyle v. McCown.....	15
Brown, Grice v.....	239
Smith v.....	239
 Campbell v. G. S. & A. Ry. Co.....	383
Cannon v. A. C. L. R. R. Co.....	233
Baker .....	116
Carolina National Bank v. Greenville.....	291
Castles, Germofert Mfg. Co. v.....	389
Charleston & W. C. Ry. Co., Sanders v.....	50
Talbert v.....	465
Citizens Bank, Anderson v.....	453
Cochran v. Greenville, S. & A. Ry. Co.....	34
Continental Ins. Co., Powell v.....	375
Corley v. Am. Baptist H. M. Society.....	460
 Davis v. Littlefield.....	171
Delleney, Germofert Mfg. Co. v.....	395

## TABLE OF CASES.

IX

Denmark Ice & Fuel Co., Middleton v.....	457
Dinkins v. Simons.....	261
Dobey v. Watson.....	349
Dunlap v. Robinson.....	79
Eaker v. Floyd.....	381
Eleazer v. Shealy.....	335
Elder Harrison Co. v. Jervey.....	185
Farmers Bank v. Talbert.....	74
Finley, Ex parte.....	37
Floyd, Eaker v.....	381
Frith, Banks v.....	362
Germofert Mfg. Co. v. Castles.....	389
Delleney .....	395
Scruggs .....	396
Gill v. Ruggles.....	278
Greenville, Carolina National Bank v.....	291
Greenville, S. & A. Ry. Co., Campbell v.....	383
Cochran v. ....	34
Rogers v. ....	383
Grice v. Brown.....	239
Hamer, Haselden v.....	178
Hartzog-Hagood etc. Co. v. Wilson.....	475
Haselden v. Hamer.....	178
Hough, State v.....	24
Hughes, Ayer v.....	255
Hunter, Virginia-Carolina Chem. Co. v.....	31
Interstate Chemical Co., Stanton v.....	403
Jennings v. McCown.....	484
Jervey, Elder Harrison Co. v.....	185
Jones v. Strickland.....	444
Johnson v. Road & Highway Commission.....	205
Kendrick v. Moseley.....	397
King, Taylor v.....	477
Kirkland v. Augusta-Aiken Ry. Co.....	61

Ledford v. Metropolitan Life Ins. Co.....	164
Littlefield, Davis v.....	171
Lyles v. Williams.....	373
McAuley v. Orr.....	214
McCown, Boyle v.....	15
Jennings v. ....	484
Rawl v. ....	1
Maples v. Spencer.....	331
Marjenhoff Co., Wreden v.....	481
Metropolitan Life Ins. Co., Ledford v.....	164
Middleton v. Denmark Ice & Fuel Co.....	457
Midland Timber Co. v. Prettyman.....	247
Moseley, Kendrick v.....	397
Muckenfuss v. A. & C. A. L. Ry. Co.....	46
Newman, State v.....	441
New England National Bank v. Wallace.....	52
Nicholson v. Villepigue.....	130
Orr, McAuley v.....	214
Phila. Life Ins. Co. v. Arnold.....	418
Poe Mfg. Co., Turner v.....	112
Pool, Turner v.....	446
Powell v. Continental Ins. Co.....	375
Prettyman, Midland Timber Co. v.....	247
Purdy v. W. U. Tel. Co.....	22
Railroad Commissioners v. Seaboard A. L. Ry.....	77
So. Ry. Co.....	77
Rawl v. McCown.....	1
Rawls v. American Central Ins. Co.....	189
Road and Highway Commission, Johnson v.....	205
Robinson, Dunlap v.....	79
Rogers v. Greenville, S. & A. Ry.....	383
Townes .....	56
Ruggles, Gill v.....	278

## TABLE OF CASES.

XI

Seaboard A. L. Ry., R. R. Commissioners v.....	77
Sanders v. Charleston & W. C. Ry. Co.....	50
So. Ry.—Carolina Division.....	423
Scruggs, Germofert Mfg. Co. v.....	396
Settlemyer v. So. Ry.—Carolina Division.....	85
Shealey, Eleazer v.....	335
Sims, In re.....	37
Simons, Dinkins v.....	261
Simkins v. W. U. Tel. Co.....	413
Smith v. Brown.....	239
Smith v. Smith.....	242
Southern Railway—Carolina Division, Sanders v.....	423
Settlemyer v..	85
Southern Ry. Co., Teddars v.....	153
Railroad Commissioners v.....	77
Southern States Phosphate Co. v. Arthurs.....	358
Spartanburg etc. Ry., Bennett v.....	27
Spencer, Maples v.....	331
State v. Hough.....	24
Newman .....	441
Williams .....	449
Stanton v. Interstate Chemical Co.....	403
Strickland, Jones v.....	444
Talbert v. Charleston & W. C. Ry. Co.....	465
Farmers Bank .....	74
Talbert et al.....	136
Taylor v. King.....	477
Teddars v. So. Ry. Co.....	153
Towns, Ex parte.....	56
Townes, Rogers v.....	56
Tucker v. Blease et al.....	303
Turner v. Poe Mfg. Co.....	112
Turner v. Pool.....	446
Villepigue, Nicholson v.....	130
Virginia-Carolina Chemical Co. v. Hunter.....	31

---

Wallace, New England Natl. Bank v.....	52
Watkins v. A. C. L. R. R. Co.....	148
Watson, Dobey v.....	349
Western Union Tel. Co., Bethea v.....	385
Purdy v. ....	22
Simpkins v. ....	413
Williams, Lyles v.....	373
State v. ....	449
Wilson, Hartzog-Hagood etc. Co. v.....	475
Wreden v. Marjenhoff Co.....	481

**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**Supreme Court of South Carolina.**

---

**Justices of the Supreme Court During the Period Comprised in  
this Volume.**

HON. EUGENE B. GARY, CHIEF JUSTICE.  
HON. D. E. HYDRICK, ASSOCIATE JUSTICE.  
HON. R. C. WATTS, ASSOCIATE JUSTICE.  
HON. T. B. FRASER, ASSOCIATE JUSTICE.  
HON. GEO. W. GAGE, ASSOCIATE JUSTICE.

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**RAWL ET AL. v. McCOWN ET AL.**

(81 S. E. 959.)

**ELECTIONS. REGISTRATION. BALLOTS. CANVASSING BOARDS. IRREGULARITIES. ILLEGAL VOTES NOT AFFECTING RESULT.**

1. Any citizen taxpayer, liable as other taxpayers in like situation for debts incurred in establishment of a dispensary, may institute proceedings in nature of *certiorari*, to review action of State Board of Canvassers declaring election on question of such establishment legal, and the State is not a necessary party to such proceedings.
2. The mere participation of a taxpayer in an election does not estop him from questioning its validity.
8. Whether or not a petition for an election upon question of establishment of a dispensary was signed by one-third of the qualified electors was a question of fact to be determined by the county supervisor, and his determination is to be accepted as correct, unless the contrary is shown by evidence. Every reasonable presumption will be indulged to sustain an election.



4. Qualified electors who have honestly complied, or attempted to comply, with the law should not be denied the right of suffrage because of the fraud, caprice, ignorance or neglect of registration officers.
5. Registration of an elector by the proper officer, unless vacated, reversed or set aside in the manner prescribed by law, is conclusive as to the elector's qualification to vote at time of registration, and such right to vote cannot be collaterally attacked; though his vote may be challenged at the polls for any other cause which makes it illegal.
6. Unless the marks upon, or size of ballots are such as could destroy the secrecy of the ballot they do not violate the statutory provisions.
7. When the findings of the county board of canvassers are concurred in by the State Board of Canvassers, the Court will not review the decision of the State board as to whether the county canvassers had capacity to act.
8. Prejudice of a county canvasser is immaterial, where his findings are concurred in by the other members, constituting a majority of the county board, and are sustained by the State Board of Canvassers.
9. Failure of managers to send up return of votes in ballot box is a mere irregularity which does not vitiate the votes in those boxes.
10. Illegal votes where they can be eliminated from the count without affecting the result do not vitiate the election.

Proceeding on petition for writ of *certiorari* by D. B. Rawl and others, citizen taxpayers in the original jurisdiction of the Supreme Court to review the acts of the State Board of Canvassers on hearing and deciding an appeal from the county board of canvassers for Lexington county.

*Mr. D. W. Robinson*, for the petitioners, cites: *Right to maintain action regardless of consent of Attorney General*: Const. V. 4; Code of Civ. Proc., sec. 11; 117 N. W. 257; 19 L. R. A. (N. S.) 613, 614; 32 Am. Rep. 219; 30 S. C. 581, 582; 39 S. C. 311; 48 S. C. 10, 13; 75 S. C. 423. *Illegality of election at various precincts*: 86 S. C. 456. *Authority for election*: 27 Stats. 745, 746. *Who are qualified electors*: 78 S. E. 738; 76 S. C. 584, 589; 84 S. C. 51; 86 S. C. 455, 456. *Registration invalid*: 1 Code of Laws 1912, 200, 236; Const. II. 4 (d); 84 S. C. 51; 86 S. C. 455. *Form of tickets*: 1 Code of Laws 1912, 231,

232; 76 S. C. 581, 582; 84 S. C. 49, 50; 78 S. C. 469, 470; 52 S. C. 303, 304. *No returns in box*: 1 Code of Laws 1912, 241. *Registration certificates and tax receipts not required of voters*: Const. II. 4 (e); 1 Code of Laws 1912, 231; 76 S. C. 584, 587, 591, 592; 84 S. C. 51; 86 S. C. 455, 456. *Capacity of canvassing board*: 86 S. C. 455. *Estoppel*: 78 S. C. 471.

*Mr. C. M. Efrid and Messrs. Thurmond, Timmerman & Callison*, for the respondents.

The opinion was filed April 27, 1914.

The facts are stated in the opinion of the Court, which was delivered by MR. JUSTICE HYDRICK.

Under a writ of *certiorari*, directed to the State Board of Canvassers, we are called upon to review the action of that board in affirming the decision of the county board of canvassers for Lexington county, which overruled the contest of the petitioners of the election held, in August, 1913, on the liquor question.

Respondents demurred to the petition on the ground that the question is one of a public and political nature, involving no such private right as would entitle petitioners to maintain the action, except in the name of the State, by consent of the Attorney General, which consent was refused.

The weight of authority and reason is against the position taken by respondents. In *Lord v. Bates*, 48 S. C. 95, 26 S. E. 213, the petitioner applied to this Court for the writ of mandamus against the State Treasurer.

1 The Attorney General refused to allow the State to be made a party, and, on his motion, the name of the State was stricken from the record. But the Court held that the petitioner was entitled to maintain the action in his own name. Mr. Justice Gary, speaking for the Court, said: "Mr. Chief Justice Taney, in delivering the

opinion of the Court in the case of *Commonwealth of Kentucky v. Denison, Governor, etc.*, 24 Howard's U. S. Rep. 66, at page 97, says: 'It is equally well settled that a mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It was so held by this Court in the cases of *Kendall v. United States*, 12 Pet. 615; *Kendall v. Stokes et al.*, 3 How. 100. And further, that the writ of mandamus does not issue from or by any prerogative power, and is nothing more than the ordinary process of the court of justice, to which every one is entitled, where it is the appropriate process for asserting the right he claims.' Mr. Chief Justice Simpson, speaking for the Court in *State v. Whitesides*, 30 S. C. 561, 9 S. E. 661, says: 'This writ was once a prerogative writ, and, in England, was supposed to issue at the instance of the crown, to meet and remedy otherwise remediless cases at his discretion. But in this country it has lost its prerogative character, and though issued in the name of the State, yet it belongs to the Courts, and has become a form of action governed by established rules as applied under established form.' See, also, A. & E. Enc. Law, vol. 14, page 92, and authorities referred to in the notes. This question was presented to the Court in *State ex rel. Hoover v. Chester*, 39 S. C. 307, 17 S. E. 752; and, while it was in terms reserved, still, if the Court had thought the objection interposed by the Attorney General was valid, it would have been without jurisdiction in the premises, and, of course, could not have decided the case then before it. The Albany Law Journal of November 7th, 1896, contains a very interesting article, giving a historical sketch of this writ. Many other authorities could be cited in support of our views, but we deem it unnecessary."

.

Respondents contend that, in analogy to the rule in actions for damages resulting from public nuisances, to entitle them to maintain this action in their own names, the petitioners must show some peculiar or special interest in the decision of the question, or damages which they will suffer from the contemplated action, which differs in kind and not merely in degree from that which the public generally will sustain. This point was decided otherwise in *Mauldin v. Greenville*, 33 S. C. 1, 11 S. E. 434. In that case, the Court held that the plaintiffs, as citizens and taxpayers, were entitled to sue, in their own names, to enjoin the city council from unauthorized acts whereby the burden of taxation would be increased, though no such special damage was alleged. The cases relied upon by respondents in this case were cited by the Court and distinguished in that case. In *Croxton v. Truesdale*, 75 S. C. 418, 56 S. E. 45, this Court held that private citizens had the right to sue to enjoin the illegal establishment of a liquor dispensary in their town.

Where the private or property rights of the citizens are invaded or threatened by the illegal action of a public body or board, he is entitled to relief, and the Courts will not deny him a remedy. The weight of authority in this country is that those writs which, in England, were originally prerogative writs, and issued only at the instance of the crown, have lost their prerogative character, and now belong to the Courts to be used as other process in the enforcement of private rights and the prevention of private wrongs. In such cases, the State is not a necessary party, though they may also be of such a public nature that the Attorney General might bring the action in the name of the State, or allow it to be brought in the name of the State upon the relation of the citizen.

The argument that, if the dispensary is established, petitioners will not be damaged, because, under the Constitution and statute and the decisions of this Court, the debts

thereby incurred will be debts of the State and not of the county, overlooks the fact that the county is a part of the State, that petitioners are taxpayers of the State, as well as of the county, and that the State makes the county liable to it for such debts.

The objection that the petitioners are estopped by reason of having participated in the election must be over-

2 ruled. *Birchmore v. Board*, 78 S. C. 461, 59 S. E. 145.

Before entering upon the consideration of the grounds of contest, it may not be out of place to say, as a note of warning to those entrusted with the administration of the election laws, that the evidence in this case, and others which have come before this Court, shows such laxness in the administration of those laws and such flagrant violations of them as ought to startle any thoughtful citizen. It is fraught with the gravest dangers to good government, and may result disastrously, when much graver issues are at stake. At least since 1898 the boards of registration have practically ignored the provisions of the Constitution and statutes on the subject. Only in rare and exceptional cases have they applied and enforced the tests prescribed to determine the qualification of those who have applied for registration, or administered the oath prescribed. Notwithstanding this Court declared, seven years ago, in *Wright v. Board*, 76 S. C., 574, 57 S. E. 536, that the production of a registration certificate and proof of the payment of all taxes due and payable for the previous year was a condition precedent to the right to vote, and that every vote cast without doing so was illegal; at some of the voting places persons were allowed to vote without complying with those mandatory provisions of the law. In *Davis v. Board*, 86 S. C. 461, 68 S. E. 876, this Court said, with regard to provisions of law which are merely directory: "These provisions of the statute should, how-

ever, be observed by the election officers, whose sworn duty is to administer the law as enacted by the legislature. It has been well said that, before an election, all provisions of the statute should be deemed and held by the officers of the election to be mandatory. Any wilful neglect of duty by such officers is made a misdemeanor by statute. Sec. 284, Crim. Code."

The statute under which this election was held required, as a condition prerequisite, that a petition therefor, signed by one-third of the qualified electors of the county, should be filed with the supervisor. The first ground of contest is that the petition was not signed by the required number of qualified electors. The respondents take the position that this objection comes too late, and cannot now be made a ground of contest of the election. The point was decided otherwise in *Little v. Barksdale*, 81 S. C. 392, 63 S. E. 208. See, also, *Parler v. Fogle*, 78 S. C. 570; 59 S. E. 707.

There were 72 petitions, which contained a total of 2,073 signatures, filed with the supervisor. Many of those who signed the petitions were not qualified electors. The registration books of the county have about 6,800 names on them, but there are not more than from 4,200 to 4,500 qualified electors in the county. This discrepancy arises from the fact that there are on the books the names of electors who have died since registering, some who have moved out of the county, and from one precinct to another and from one polling place to another in the same precinct, so that, in some instances, the same name appears on the books two, three and even as many as four times. Again, in some cases, different persons have the same name and initials.

To determine whether the petition was signed by the required number of electors, the supervisor obtained from the board of registration a certificate that there were not



more than 4,200 qualified electors in the county,  
3 and, with the aid of two competent assistants, he spent about two weeks comparing the names on 24 of the petitions, which contained a total of 519 signatures, with the registration books, and found, according to the best information that he could obtain, that 389 of them were qualified electors. Adopting this as a fair average, he decided that 74 per cent. of those who signed the petition were qualified electors. He found, therefore, that the petition was signed by the required number, and ordered the election.

There was no legal error in the method adopted by the supervisor. From the very nature of the case, mathematical precision was impracticable, if not impossible. The degree of precision which may be required in such a case necessarily depends to some extent upon the number of names to be canvassed and the extent of the territory in which they reside. Where both are large, as in this case, there can be no legal or reasonable objection to the method adopted, especially where the estimates are fairly and honestly made, and it is not even suggested that they were not so made in this case. Moreover, the decision of the supervisor was *prima facie* correct, and before this ground could have availed the contestants, they would have had to show that the petition was not, in fact, signed by the required number, which they failed to do.

The contention that the supervisor erred in not examining the tax books to ascertain whether those who signed the petition had paid their taxes cannot be sustained. For, while it is true that a qualified elector must be one who is qualified to vote (*Culp v. Union*, 95 S. C. 131, 78 S. E. 738), and the payment of all taxes assessed and collectible during the previous year is a prerequisite of the right to vote, still the presumption is that those who signed the petition had paid their taxes, and the burden was upon contestants

to prove that they had not. Every reasonable presumption will be indulged in to sustain an election.

The next ground of contest is that the entire registration of the electors was invalid, because the registration officers failed to apply the tests of qualification prescribed by the Constitution and statutes for those applying for registration, or to administer the prescribed oath to them. These provisions of the law are directed to the officers who are entrusted with its administration, and not to those who apply for registration, unless they are guilty of a fraudulent participation in violating them. It would be unreasonable and unjust to deny to honest electors, who complied with the law, and those who were ready and willing to comply with it, their constitutional right of suffrage on account of the fraud, caprice, ignorance or neglect of duty of the registration officers.

Moreover, by the Constitution and statutes of this State, registration is made conclusive evidence of an elector's qualification therefor at the time it was granted, unless it is annulled in the manner prescribed by law. The

5 Constitution (subdivision (c) of section 4, article 2) provides that all persons registered before January 1, 1898, shall remain qualified electors during life, unless disqualified by the other provisions of that article. Section 5 of the same article provides that any person denied registration may appeal to the Courts to determine his right to vote, and that the legislature shall provide for the correction of illegal and fraudulent registration. Section 8 of the same article provides that the registration books shall be public records, open to the inspection of any citizen at all times; and section 11 provides that they shall be closed at least thirty days before an election, during which time transfers and registration shall not be legal. The act of 1898 (sec. 206, vol. I, Code 1912) provided that, up to and including January 1, 1898, the boards of registration should judge of the qualifications of all appli-

cants for registration; that any person denied registration might appeal to the Court of Common Pleas, and that the applicant or any qualified elector of the county might appeal from the decision of the Court of Common Pleas to the Supreme Court. Section 208 provides that, after January 1, 1898, the board of registration shall judge of the legal qualifications of all applicants for registration, with like right of appeals as provided in section 206. Section 213 reads: "The board of registration shall revise the list of registered electors at least ten days preceding each election, and shall erase therefrom the names of all registered electors who may have become disqualified, or who, upon satisfactory evidence, may appear to have died, or removed from their respective counties, or who have been illegally or fraudulently registered: *Provided*, That any one who may deem himself injured by such an act may have the same right of appeal to the Court of Common Pleas or any Judge thereof, as hereinbefore provided for persons who have been denied registration." These provisions of the law make manifest the intention that registration by the proper officers is conclusive evidence of the qualifications of the elector therefor, until reversed or set aside in the manner prescribed, for which ample time and opportunity is allowed. This does not mean that registration alone, or the possession of a registration certificate, entitles the holder thereof to vote. A registered elector may be denied the right to vote on numerous grounds; as, for example, if he was registered within thirty days of the election (*Gunter v. Gayden*, 84 S. C. 48, 65 S. E. 948), or if, since his registration, he has removed his residence from the county, or his precinct, or has been convicted of a disqualifying offense, and for other causes. It means only that registration concludes collateral inquiry into the qualification of the elector therefor at the time it was granted. His vote may, however, be challenged at

the polls, or on contest of the election, for any other cause which makes it an illegal vote.

The next ground is that the ballots voted did not comply with the requirements of the statute. The statute under which the election was held provides that the election shall

be held and conducted by the same officers and  
6 under the same rules and regulations provided by law for general elections. It also provides that every voter who may be in favor of the sale of liquors shall cast a ballot on which shall be printed the words: "For sale of alcoholic liquors and beverages," and every voter opposed thereto shall cast a ballot on which shall be printed the words: "Against sale of alcoholic liquors and beverages." The general election law (sec. 236, vol. I, Code 1912) provides that ballots shall be of plain white paper, two and a half inches wide by five inches long, clear and even cut, without ornament, designation, mutilation, symbol or mark of any kind whatsoever, and that no ballot of any other description shall be counted. The ballots provided by the commissioners of election had printed at the head thereof the words, "Lexington County. Special election upon the question of 'Dispensary' or 'No Dispensary' under the act of the General Assembly at its 1912 session. August 19, 1913." Some of them had printed in the body thereof the words: "For sale of alcoholic liquors and beverages." On others were the words: "Against sale of alcoholic liquors and beverages." Some ballots were voted which had no heading, and only the words, "Against sale of alcoholic liquors and beverages" printed thereon. These were furnished by those opposing the sale of liquors, and it is contended by the petitioners that they were the only legal ballots cast. Their objection to the others is that the heading makes them obnoxious to the provisions of the statutes above quoted. This objection cannot be sustained; for, while the statute of 1912 does say that the ballots shall contain the words mentioned,

there is no prohibition, express or implied, against the printing thereon of the words above quoted. There can be no objection, founded on good reason, to the heading. The main purpose of the statute in prescribing the size of the ballot, the kind of paper on which it shall be printed, and in prohibiting any ornament, designation, etc., was, no doubt, to preserve the secrecy of the ballot, and to prevent fraud, intimidation and bribery. While the statute is mandatory, it should be construed reasonably, regard being had to its purpose, and the mischief which it was intended to prevent. The heading, being the same on the ballots for and against sale, could not have destroyed the secrecy of the ballot. Therefore, it did not conflict with any provision of the statute. The other ballots, on which there was no heading, were contested by those in favor of sale only on the ground that they were not of the prescribed size. They varied from the size prescribed less than an eighth of an inch, a difference so slight that it could not be detected, except by precise measurement with a finely graduated rule, or by the most careful and minute inspection. As the difference was so slight that it was not appreciable to the eye, it could not have destroyed the secrecy of the ballot. The lawmakers did not intend that legal voters should be deprived of their right of suffrage by such a strict and technical construction of the statute which was designed merely to safeguard that right.

This conclusion is not in conflict with the decision in *Ex parte Riggs*, 52 S. C. 298, 29 S. E. 645. The report of that case shows that certain ballots were not counted, because they did not come up to the requirements of the statute "in respect to size, and were not without ornament, designation," etc., but it does not show what the difference in size was, or what the ornament, designation, etc., was. But the Court found that an inspection of the ballots "very plainly showed the fact," that is, that they did not meet the requirements of the statute. If ordinary inspection

very plainly showed that fact, of course, the purpose of the statute was frustrated, for the secrecy of the ballot was thereby destroyed, since the ballots rejected were not the only ones voted, and they differed from the others in the respects mentioned.

During the hearing before the county board of canvassers, two members of the board were noticeably under the influence of liquor. The other member, Mr. G. A.

Goodwin, who was sworn as a witness for the petitioners, and he was the only witness on that point, testified that they were not so drunk as to incapacitate them, and he signed with them a report to the State board to that effect. As there was evidence to support this finding, which was concurred in by the State board the question is not reviewable here.

The further ground is taken that one of the members of the board, besides being under the influence of liquor, was so biased and prejudiced against the contestants, that he actually declared the contest overruled before hearing any evidence or argument. Deplorable as this may be, it cannot avail the contestants, because the other members of the board constituted the majority, and there is no evidence that they, or either of them, was biased or prejudiced. Moreover, the State board, upon the same evidence, which is practically undisputed upon the chief grounds of the contest, sustained the decision of the county board.

The vote of Pool's Mill and Efrid's Store was contested on the ground that the managers did not send up a return of the votes in the ballot boxes. The returns were sent to the secretary of the board of canvassers and were produced by him and put in evidence. This was a mere irregularity which does not vitiate the vote of those boxes. *Wright v. Board*, 76 S. C. 586, 57 S. E. 536.

At Shull's Store and Edmund's, the managers did not require proof of payment of taxes. Some of the voters at each precinct did produce their tax receipts, but enough illegal votes were cast at each to leave the result in doubt, and, therefore, the vote of these precincts should have been rejected. At Crout's Store, the managers did not require the voters to produce either registration certificates or tax receipts. The vote of that box should have been thrown out. At a few other precincts, illegal votes were cast, but they were clearly identified, so that the ballot can be purged of them.

The other grounds of contest were not pressed in the argument, and, therefore, they will not be discussed in detail. It is only necessary to say that they have no substantial merit, and are, therefore, overruled.

After deducting the vote of the precincts which  
10 should have been thrown out, and all other illegal votes, there still remains a majority in favor of sale.

For the foregoing reasons, the petition is dismissed, and the result of the election, as declared by the State Board of Canvassers, is affirmed.

MR. JUSTICE FRASER, *dissenting*. I cannot concur in this opinion. It seems to me that when the officers of the law charged with the execution of the law do what the law forbids or fail to do what the law commands, the result of the unlawful acts is a nullity at least.

MR. JUSTICE GAGE did not sit in this case.

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FOOTNOTE—The question of marked ballots is treated in a note in 47 L. R. A. 896.

8772

## BOYLE ET AL. v. McCOWN ET AL.

(81 S. E. 810.)

## ELECTIONS. QUALIFICATION OF CANVASSERS. INTEREST IN QUESTIONS OF PUBLIC POLICY. CONTESTS. PROTEST. EVIDENCE.

1. That one of the county board of canvassers had been employed and paid to circulate the petition for an election on the question of the sale of alcoholic liquors, and that another member of the board was a member of a town council which had employed him, though it was not shown that he voted to employ and pay him, did not disqualify either from sitting on the county board of canvassers, since the interest in a case which will disqualify one from acting judicially therein must be something more than an interest in a question of public policy.
2. The county board of canvassers being required to meet on the Tuesday following an election on the question of the sale of alcoholic liquors to canvass the votes and declare the result, protests and contests should be filed on that day, and where the grounds of objection and protest, which contestants sought to have considered, where known or by the exercise of due diligence might have been known to them in time to present them at such meeting, the board's refusal of a continuance after adjournment to the following Saturday was not such a clear abuse of its discretion as would warrant a reversal of its action; since the Supreme Court will only correct a manifestly erroneous exercise of it resulting in prejudice to the complaining party.
3. A protest in an election contest alleging in clear language that the entire vote of two boxes named should be rejected because the managers allowed all persons who offered, to vote, without requiring them to produce registration certificates, and proof of payment of taxes, by reasonable intendment alleged that the result would thereby be affected and made it a necessary inference that the voters did not produce their registration certificates and proof of payment of taxes.
4. In a contest of an election on the question of the sale of alcoholic liquors, testimony of the managers of the election to prove allegations that voters in certain precincts had been allowed to vote without producing their registration certificates or proof of tax payments, and that the result was thereby affected, was admissible, since such testimony did not contradict the returns, which merely stated the result after stating the number of votes cast on each side.

Petition for *certiorari* by T. W. Boyle and others against R. M. McCown and others, State Board of Canvassers. Petition dismissed. In the original jurisdiction.



*Messrs. C. W. Stoll, Purdy & Bland, and Charlton DuRant*, for petitioners.

*Mr. LeRoy Lec*, for respondents.

March 28, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

This action was brought to have this Court review, under its writ of *certiorari*, the action of the State Board of Canvassers, which, by an equally divided vote, affirmed the decision of the county board of canvassers for Williamsburg county, whereby the result of an election held on the question of the sale of alcoholic liquors in said county was declared in favor of the sale thereof. The election was held on Tuesday, August 19, 1913, pursuant to the statute; the county board of canvassers met on the following Tuesday, August 26th, to canvass the vote and declare the result. On the face of the returns sent up by the managers of the election, the total vote was 253 for and 255 against sale. At that meeting, the board announced that all protests must be filed that day. Although persons representing both sides of the controversy were present and represented by counsel, no objection appears to have been made to the adoption of that rule at that time. W. N. Jacobs filed a protest against counting the vote of Muddy Creek precinct (which was 13 for and 25 against sale), and Hebron precinct (which was 9 for and 16 against sale), on the ground that, at the former, the managers allowed all persons, who offered, to vote, without requiring them to produce registration certificates and proof of payment of taxes, and, at the latter, all, who offered, were allowed to vote, without producing proof of payment of taxes. He alleged that, for these reasons, the vote of those precincts was illegal and should not be counted, and that the result shall be declared to be for sale. N. D. Lesesne filed a

protest against counting the Kingstree box (which was 97 for and 70 against sale), on the ground that the manager did not require voters to take the prescribed oath before allowing them to vote. The board then adjourned to meet on Saturday, the 30th, to hear these protests. When the board met, pursuant to adjournment, the attorneys for those opposing the sale of alcoholic liquors objected to the jurisdiction of the board on the ground that two of its members, J. C. Kinder and M. A. Ross were disqualified, because Ross was a member of the town council of Kingstree, which town council had employed Kinder and paid him \$100 to circulate the petition praying for the election. They also asked permission to file a protest on the ground that the petition praying for the election was not signed by one-third of the qualified electors of the county, as required by statute. They also asked to be allowed to file a protest against the Kingstree box, on the ground that proof of payment of taxes was not required of the voters. Adhering to the rule adopted and announced at its first meeting, the board overruled the objection and requests, on the ground that they should have been filed on the day of the first meeting. The petitioners then demurred to the protest of Jacobs, on the ground that it was too indefinite to notify contestees of the precise grounds thereof, and the particular votes which it challenged, though it admitted that some legal votes had been cast, and because it did not allege that the result, either at those boxes or in the county, would be changed; and, also, because it was not alleged that any voters failed to exhibit their registration certificates and tax receipts. The demurrer was overruled. Against objection, the board admitted the testimony of the managers of those boxes to prove the grounds of protest. Just here, it may be said that the grounds alleged were clearly proved. Lesesne's protest was called, but it was withdrawn, as being without merit, or abandoned. At any rate, it was not

prosecuted. Later in the afternoon of this day the contestees of Muddy Creek and Hebron boxes moved for a continuance of the hearing until Tuesday of the next week, and, upon this being refused, they moved that it be continued until Monday, to give them time to get witnesses to prove that the voters at these boxes had produced their registration certificates and tax receipts. This motion was also refused. The board then rejected the vote at Muddy Creek and Hebron precincts, and declared the result to be for sale by a vote of 231 to 214. As already stated, this decision was affirmed by an equally divided vote of the State Board of Canvassers.

Under the facts stated, neither Ross nor Kinder was disqualified to sit on the board. The interest in a case will disqualify one from acting judicially therein must be

something more than an interest in a question of

1 public policy. All intelligent citizens have formed, and perhaps expressed, opinions, more or less decided upon questions of public policy—especially such as the liquor traffic—but certainly that would not disqualify them from acting as managers of an election on such question, or as members of a board charged with the duty of canvassing the votes. So far as Ross is concerned, it does not appear that he even voted in the town council to pay Kinder to circulate the petition. He may have voted against it. On the contrary, it does appear that he voted, though erroneously, against throwing out the vote of Muddy Creek and Hebron precincts. As to Kinder, about all that can be said is that he displayed very bad taste for one occupying his position. Those who are intrusted with the administration of the law should so demean themselves as to avoid even the suspicion of being guilty of improper conduct or of having their judgment swayed by improper influences. While his conduct in circulating the petition for the election, while occupying the office of commissioner of election, was unquestionably

improper, and would naturally cause his acts to be the more carefully scrutinized, when he is charged with abuse of discretion as such commissioner, still his interest in the matter, not being of a personal nature, did not disqualify him.

Perhaps the most important question in this case is: Did the board abuse its discretion in limiting the time for the filing of protests? In deciding that question, all the circumstances must be considered, and a clear case

2 should be made out before this Court would be warranted in reversing the action of the board. The law has vested the discretion in the board, not in the Court, and therefore the Court will not substitute its discretion for that of the board, but will only correct a manifestly erroneous exercise of it, resulting in injury or prejudice to the party complaining.

Now, in the first place, the law requires more than ordinary diligence on the part of those who would contest an election. This is evidenced by the fact that the county board of canvassers are required to meet on the Tuesday following the election to canvass the votes and declare the result. Therefore, it must have been intended that protests and contests should be filed on that day, for clearly it would be too late, after the votes had been canvassed, the result declared, and the records forwarded to the State board. Parties interested in an election have the opportunity of watching at the polls, and of noting illegalities and irregularities in the conduct thereof. Ordinarily, there appears to be no good reason why these could not be brought to the attention of the board of canvassers on the day it meets to canvass the votes. Of course, if any emergencies or extraordinary conditions exist why it cannot be done, that would be matter to be addressed to the discretion of the board on motion for further time. It is clear that the grounds of objection and protest which these petitioners sought to have considered were known,

or by the exercise of due diligence might have been known, to them in ample time to present them to the board at its first meeting. The board should have been informed as early as possible of all grounds of protest or contest, in order that it might the more intelligently have exercised its discretion in fixing the time for the hearing. But it is argued that, as the majority was against sale on the face of the returns, those who favored that side were not called upon to file any protest or contest, until that majority was reversed. A moment's reflection will show that the argument is unsound. That method of procedure would necessitate the hearing of contests by piecemeal; for, if that method had prevailed, the vote of each precinct in the county might have been contested, one at a time, as the majority was changed from one side to the other. Under the circumstances appearing in the record, it cannot be said that the board erred in refusing to entertain protests filed after the time limited by it.

There was no error in overruling the demurrer to the protest of Jacobs. That protest alleged in clear and unmistakable language that the entire vote of the two boxes named should be rejected for the reasons stated,  
3 and it was, by reasonable intendment, if not directly, alleged that the result would thereby be affected. The objection that the protest did not allege that the voters failed to exhibit their registration certificates and tax receipts, but only alleged that they were not required to do so, is too refined and technical. The necessary inference from the allegation that they were not required to do so is that they did not produce them.

Nor was there error in admitting the testimony of the managers to prove the facts alleged. The testimony did not contradict the returns, which merely stated the result,  
after stating the number of votes cast on each side.  
4 The returns did not state that the election had been legally conducted, and, if they had, the state-

ment would have been merely the opinion of the managers on a question of law.

From what has already been said, it follows that there was no error in refusing the motion for a continuance to enable the petitioners to get witnesses to rebut the testimony of the managers. In the first place, it was not made to appear that any witness could have been produced, who would have testified to the contrary. In the next place, the petitioners were fully advised by the allegations of the protest and the accompanying affidavits of the managers not only what the issue was, but what the testimony in support thereof would probably be, and they had ample time to subpoena their witnesses and have them present at the hearing. The right of cross-examination was not unreasonably hampered. The questions which were ruled out as irrelevant were clearly so.

The question whether the board erred in counting the vote of S. C. Mitchum and in throwing out two votes from Salter's box need not be considered, as the result was not thereby affected.

The other exceptions to the rulings of the board are so clearly ruled by the previous decisions of this Court that they do not require further discussion.

Petition dismissed.

MR. JUSTICE FRASER concurs in the result.

MR. JUSTICE GAGE did not sit in this case.

8773

## PURDY v. WESTERN UNION TELEGRAPH CO.

(80 S. E. 459.)

## TELEGRAPH COMPANY. DISCLOSURE OF MESSAGE. PUNITIVE DAMAGES.

The disclosure by a telegraph operator of the contents of a message addressed to plaintiff, with reference to rates of premium charged by a surety company on the bonds of a public officer, does not justify the imposition of punitive damages on the telegraph company, there being a total absence of testimony showing the disclosure to be wilful.

Before SHIPP, J., Ridgeland, May, 1913. Affirmed.

This is an action brought by H. Klugh Purdy, plaintiff, against the defendant, Western Union Telegraph Co., for twenty-five hundred dollars punitive damages on account of an alleged wilful and wanton disclosure of the contents of a certain telegram sent plaintiff by the National Surety Co., with reference to its rates on the bond of certain public officers. The case went to the jury only on the question of punitive damages and the jury returned a verdict for eight hundred dollars.

A motion for new trial was made upon two grounds: first, because the verdict of the jury for eight hundred dollars is grossly excessive; and, second, because there was no evidence of wanton, wilful or intentional wrong on the part of defendant or its agents or any evidence which would warrant a verdict for punitive damages, and the evidence at most would support only a verdict for nominal damages.

The case was tried and the motion argued on May 16th, 1913, and on July 18th, 1913, Hon. S. W. G. Shipp, presiding Judge, filed an order granting the new trial upon the ground that there was no testimony warranting punitive damages.

From the order granting a new trial the plaintiff appeals.

REF.]

November Term, 1918.

*Mr. L. A. Hutson*, for appellant, cites: *Whether the inference of wilfulness should have been drawn from the testimony was for the jury*; 88 S. C. 14; 91 S. C. 75.

*Messrs. Nelson, Nelson & Gettys*, for respondent, cite: Code, sec. 2725-2730; 84 Miss. 280; 62 S. C. 270.

April 28, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

The appellant thus states his case:

"The testimony in this case shows that a telegram was sent from New York by the National Surety Company to H. Klugh Purdy, its agent at Ridgeland, S. C., reading as follows:

"'Necessary to maintain manual rates on all public business.' That H. Klugh Purdy was not in Ridgeland when the said message was received, but had instructed said agent at Ridgeland to forward said message to Verdery, S. C., which said agent did.

"That said agent delivered the above stated message to John P. Wise, who was agent for a competing bonding company, and to H. H. Porter without the consent of the sender or addressee and that the contents of said message was generally known in Ridgeland when the addressee was at Verdery, S. C., two hundred miles away.

"The only question in this appeal is whether his Honor erred in granting a new trial on the ground that there was a total absence of testimony to show wilfulness."

The Circuit Judge was right. There was a total absence of testimony to show wilfulness.

The appeal is dismissed.



8774

STATE v. HOUGH.

(81 S. E. 187.)

## CRIMINAL LAW. TRIAL. INSTRUCTIONS. BELIEF.

1. After jury had been out about eleven hours, the Court had them brought in, and inquired if they had agreed upon a verdict. The foreman announced, they had not, and were rapidly coming to a conclusion when sent for. The Court then advised them of the desirability of reaching a verdict, if they could reasonably and conscientiously do so, and gave an additional charge as to the law with reference to reasonable doubt, and added: "In contemplating the question whether or not you are satisfied beyond a reasonable doubt, and I have charged you that you must be satisfied beyond a reasonable doubt before you can write a verdict of guilty, the question arises: What do you believe, when you contemplate a reasonable doubt? What do you believe has been proven beyond a reasonable doubt? And, as to that point, and that question, if you will stand on Mt. Olympus, as it were, and stand in the presence of your own personality, you will come to the conclusion that belief is something over which you have no control." *Held*, that the charge was not erroneous. "Belief" is a conviction or assurance of the truth of anything on grounds other than personal observation or experience, which it is the purpose of evidence to induce.

MR. JUSTICE FRASER *dissents*.

2. Where jury has been out for the space of eleven hours, it is not improper for the Court to call them in, and give additional instructions on law as to reasonable doubt, the additional charge being appropriate to the ground of the jury's difference.

Before SEASE, J., Camden, March, 1913. Affirmed.

Conviction on indictment for murder. The opinion states the case.

*Messrs. E. D. Blakeney and Kirkland & Kirkland*, for appellant, cite: *Statute only provides for recharge on law applicable to case, on jury's return into Court, without having agreed*: 1 Code of Laws, S. C., 1912, 4050; 1 Heisk. (Tenn.) 202. *Reasonable doubt*: 37 S. E. 690; 72 Miss. 95; 16 So. 202.

*Mr. Solicitor Cobb and Mr. M. L. Smith, contra, cite: Propriety of additional charge: 87 S. C. 331; 74 S. C. 142; 86 S. C. 48. Reasonable doubt: 75 S. C. 481.*

March 28, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

In a very clear and impartial charge, the trial Judge instructed the jury that, under their oaths, they were compelled to find a verdict of not guilty, unless the State had proven the guilt of the defendant beyond a reasonable doubt, and that they must give him the benefit of every reasonable doubt that might arise in the case. The same instruction, in substance, was repeated several times. The reasonable doubt was defined or explained in a manner which has been approved by this Court, and to which no exception was taken.

After the jury had been out about eleven hours, the Judge had them brought in, and asked if they had agreed on a verdict. On being told they had not, he asked if they wanted any further instruction as to the law.

1 The foreman stated that the charge was very clear and he thought they understood it; that their differences were as to matters of evidence. Thereupon, after stating that he could give them no aid upon that matter, the Court advised them of the desirability and importance of reconciling their differences and reaching a verdict, if they could reasonably and conscientiously do so; that they should put aside preconceived opinions, pride of opinion, bias and prejudice, and reason together, and settle their differences, if they could honestly do so. After telling them that they should look within and see if there was anything standing in the way of an honest, conscientious performance of their duty, he concluded his remarks in the following language: "In contemplating the question whether or not you are satisfied beyond a reasonable doubt,

and I have charged you that you must be satisfied beyond a reasonable doubt before you can write a verdict of guilty, the question arises: What do you believe, when you contemplate a reasonable doubt? What do you believe has been proven beyond a reasonable doubt? And, as to that point, and on that question, if you will stand on Mt. Olympus, as it were, and stand in the presence of your own personality, you will come to the conclusion that belief is something over which you have no control. You may desire to believe this or that, but there is something deep down in your bosom that tells you what you believe."

Appellant imputes error to the Court in the language quoted, alleging that it confused "belief" with "satisfaction beyond a reasonable doubt," and reduced a reasonable doubt to a mere matter of belief, upon which the jury may have acted in reaching a verdict.

The object of evidence is to produce belief, which is defined in the Standard Dictionary: 1. "A conviction or assurance of the truth or actuality of anything on other grounds than personal observation or experience, *i. e.*, on other than demonstrative evidence." 2. "Mental assent to or acceptance of anything as fact or truth on the ground of testimony or authority." Besides the instruction in the previous charge and immediate connection with these remarks, that they must be satisfied beyond a reasonable doubt, the question, "what do you believe has been proven beyond a reasonable doubt?" shows clearly that the jury could not have been confused as suggested. Nor does the fact that they agreed upon a verdict in half an hour after they were sent back to their room warrant such a conclusion. When they were brought into Court, the foreman stated to the Court that they were rapidly coming to a conclusion, when they were sent for, and they were sorry that they had kept the Court waiting.

The other exceptions assign error in giving any additional instruction at all, and, having done so, in not restat-

ing all the law applicable to the case. There was no error in giving the additional instructions. *Dover v. Lockhart*, 86 S. C. 229, 68 S. E. 525; *Caldwell v. Duncan*, 87 S. C. 331, 69 S. E. 525; *State v. Jones*, 86 S. C. 17, 67 S. E. 160. Nor was there error in not restating all the law of the case. It had been clearly stated and the jury said they understood it. The additional charge was appropriate to the ground of the jury's difference.

Affirmed.

MR. JUSTICE FRASER, *dissenting*. I dissent. See *State v. Angel*, 93 S. C. 155, 76 S. E. 195: "It is not what the jury thinks or what may be their impression unless they are convinced."

This was the last statement and at the most effective time and substituted belief for conviction.

MR. JUSTICE GAGE did not sit.

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8775

BENNETT v. SPARTANBURG RY., GAS & ELECTRIC CO.

(81 S. E. 189.)

ACTIONS. JOINDER. PARTIES.

An administrator whose intestate died from injuries negligently caused, cannot, under Code Civil Proc. 218, unite in a single action against the tort feisor, a cause of action surviving to him for the damages suffered by his intestate with a cause of action under Lord Campbell's Act for the benefit of the kin of said intestate; since the real parties plaintiff in interest, and the elements of damages recoverable, in the two causes of action are different.

Before MEMMINGER, J., Spartanburg, March, 1913.  
Reversed.

Action in tort, by N. L. Bennett, clerk of court, as administrator of the estate of Lucy Gales, deceased, against the Spartanburg Railway, Gas & Electric Company. From an order overruling its demurrer for misjoinder of causes of action, defendant appeals.

The opinion states the case.

*Messrs. Sanders & DePass*, for the appellant, cite: *The action under Lord Campbell's Act, Code of Laws 1912, secs. 3955 and 3956, is a different action from that at common law which survives under sec. 3963: 60 S. C. 410. Elements of damages in each are different: 60 S. C. 237.*

*Mr. Stanyarne Wilson*, for the respondent, cites: 70 S. C. 280.

March 31, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

The plaintiff set out two causes of action in his complaint. In the first, he alleges that, in the fall of 1908, his intestate was negligently injured by the defendant in consequence of which she suffered in body and mind and was partially incapacitated, until December, 1911, when she died. On account of her injury, he asks for \$5,000.00 damages.

In the second cause of action, he alleges the same injury, and that it caused her death, and prays judgment for \$10,000.00 damages for the benefit of her husband and children.

The defendant demurred to the complaint on the ground that two causes of action were improperly united therein. The demurrer was overruled, and defendant appealed on the sole ground that the Court erred in not holding that two separate and distinct causes of action were improperly united in the complaint.

At the common law, the first cause of action would have died with the intestate. But it was made to survive to her administrator by the statute, which was passed in 1905 (24 Stat. 945, incorporated as section 2963, vol. I, Code 1912), which provides among other things that causes of action for and in respect to "any and all injuries to the person" shall survive to the personal representative of the deceased. Also, at the common law, there was no right of action for an injury causing death. The statute familiarly known as Lord Campbell's act (which, with some amendments, is incorporated in the Code of 1912, vol. I, sections 3955-3956) gave such a right of action. This was the creation of a new right of action, where none existed before. *Mayo's Estate*, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660. The statute provides that this action shall be for the benefit of the wife or husband and children of the deceased, or, if there be none such, then for the benefit of the other persons therein mentioned, and that it shall be brought by or in the name of the executor or administrator of the deceased. The damages recoverable are such as the jury may think proportioned to the injury resulting from the death to the beneficiaries named, and the amount recovered shall be divided among them.

Now the only question presented by this appeal is: Can these two causes of action be joined in the same complaint? Section 218 of the Code of Civil Procedure provides what causes of action may be united in the same complaint. The first subdivision of that section permits the joinder of several causes of action in the same complaint, where they arise out of the same transaction. Unquestionably both of these causes of action arose out of the same transaction—the same accident and injury. But the last paragraph of that section further provides that the causes of action so united, except in actions for foreclosure of mortgages, must affect all the parties to the

action. In this respect, these two causes of action fall short of the statutory requirement. While the party plaintiff is nominally the same as to each cause of action, in reality his relation to and interest in each is entirely separate and distinct. In the one, he is the representative of the estate of the deceased, and the recovery, if any, is for damages resulting from the injury to deceased, and the amount recovered will go into his hands as assets of the estate, liable for the payment of debts and other claims against the estate. In the other, he is the representative of the beneficiaries named in the statute, and the recovery, if any, is for damages resulting to them, and the amount recovered will be distributed amongst them. Therefore, as representative of the estate, the cause of action in favor of the husband and children does not affect him; and as representative of the husband and children, the cause of action in favor of the estate does not affect him. In *Reed v. Ry. Co.*, 37 S. C. 53, 16 S. E. 291, the Court said: "That the act requires the personal representative (administrator or executor) to sue, need not trouble us, the legislature could as well impose that duty on the sheriff or the coroner. The proceeds recovered are not for creditors, or the family generally, or for the legatees, but is strictly confined to certain members of the family of the deceased." In contemplation of law the action is practically the same as if plaintiff had administered upon the estates of two different persons who were killed at the same time and in the same manner, and had joined the cause of action for each estate in the same complaint.

Moreover, the elements of damage recoverable are entirely different. In the first, plaintiff may recover all damages which his intestate sustained by reason of the injury, such as physical and mental suffering, expenses, loss of time and impaired capacity. In the other, no damages resulting to the deceased are recoverable, but only such as her death caused to her husband and children.

Necessarily, therefore, there must be separate verdicts and separate judgments, and, hence, there should be separate actions and separate trials.

Reversed.

MR. JUSTICE GAGE took no part in this case.

8776

VIRGINIA-CAROLINA CHEMICAL CO. v. HUNTER *ET AL.*

(81 S. E. 190.)

FRAUDULENT CONVEYANCES. JURISDICTION. RES JUDICATA. MODIFICATION OF ORDER OF SALE.

1. Where, in a suit by creditors to set aside mortgages, etc., as in fraud of creditors, the debtor in whom was the legal title to the property and the lien creditors were parties, the Court had jurisdiction to order sale of the property.
2. Where, in a suit by creditors to set aside a mortgage as fraudulent, and for the appointment of a receiver, etc., the referee advised a sale of the property, an order directing its sale was *res judicata*, if there was no appeal from the order. The propriety of the order could not be reconsidered in the absence of a change of conditions, such as payment or arrangement of outstanding debts.
3. If, in proceedings by creditors to set aside fraudulent conveyances and have the property sold, etc., a change of conditions is shown after the order was made ordering the sale of the property, such as the payment or arrangement of a part of the debts, a subsequent Judge could modify the order to meet the changed conditions.

Before DEVORE, J., Laurens, July, 1913. Affirmed.

Creditors' bill by the Virginia-Carolina Chemical Company against G. Wash Hunter and others. From an order directing the sale of certain property by receivers, defendants appeal.

Mr. Fred. H. Dominick, for the appellants.



*Messrs. Grier & Park and Dial & Todd* for the respondents.

April 1, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

This is the third time this case has been before this Court. The former judgments of this Court appear in 84 S. C. 214, 66 S. E. 177, and 94 S. C. 65, 77 S. E.

The plaintiff filed a creditors' bill and asked for the calling in of creditors and the appointment of a receiver of the debtor's property. It was referred to Hon. Frank B. Gary to hear and determine all questions of law and fact and to report any special matter. The referee reported, among other things, as follows:

"I find as matter of law that there has been such fraudulent disposition of his property on the part of the defendant, G. Wash Hunter, as makes it proper for the receivership and injunction in this case heretofore granted, to be continued, and to the end that all creditors may be protected, the Court, through its receiver, should take charge of the property of the said Hunter, convert it into cash and pay off the various claims according to their respective priorities."

There were exceptions to this report, but the case fails to disclose the exceptions. The case was heard by Judge Gage, who adjudged, "It is ordered that the report of Hon. F. B. Gary be, in all respects, confirmed and made the decree of this Court." From this judgment the appellant appealed to this Court, which affirmed the judgment of Judge Gage. The referee advised the sale, though the creditors had not been called in.

When the case was next called on Circuit, Judge DeVore made an order of sale and fixed the time, terms, etc., of sale.

REF.]

November Term, 1918.

From this order this appeal is taken on the following exceptions:

"1. Because his Honor, the presiding Judge, had no jurisdiction to pass so much of said order as provides for the sale of all the lands and property of said G. Wash Hunter and reduction of all his assets to cash, there being no testimony, report, finding or recommendation before him in said case showing that it is necessary for all of the property or any part thereof to be sold and same reduced to cash, none of the claims against the said Hunter having been proved, as required by law, except the claim of the plaintiff."

"2. Because his Honor, the presiding Judge, had no jurisdiction to pass said order and erred in so doing, on account of the fact that there had been no general call for creditors and it had not been established or shown that it is necessary for all of the property of the said G. Wash Hunter, or any part thereof, to be sold and his assets reduced to cash."

"3. Because his Honor, the presiding Judge, erred in passing said order in so far as said order relates to the sale of all the property of the defendant, Hunter, and the reduction of his assets to cash, on account of the fact that the testimony and the facts are not sufficient to support the said order."

These exceptions cannot be sustained.

So far as the case shows, the debtor, in whom was the legal title, and the lien creditors were before the Court and the Court therefore had the jurisdiction to order a sale. The referee advised a sale. The question

1 as to the advisability of that recommendation, was a proper subject to be raised on the application for a confirmation of his report. If the question was raised, it was decided by the order of Judge Gage, and if decided adversely to appellant, then it was a proper ground of appeal from Judge Gage's order. This question not hav-

ing been excepted to, or having been excepted to, and the exception not sustained, the matter became *res judicata*. The only question raised here is to an order of sale and that we have seen is *res judicata*.

Of course if the defendant had shown a change of conditions such as the payment or arrangement of some 2, 3 or all of his debts a subsequent Judge would have had the right to modify the order to meet the changed conditions. No such change was shown.

MR. JUSTICE GAGE took no part in the decision of this cause.

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8777

COCHRAN v. GREENVILLE, S. &amp; A. RY.

(81 S. E. 191.)

FRAUD. RESCISSION. TENDER OF PRICE.

A grantor conveying to an electric railroad company land on which to build its road, with the right to make necessary cuts and fills, cannot, without tendering back the price paid, maintain an action for fraud based on the company's representation that its road would run at grade, while it made a cut of eight or ten feet.

MR. JUSTICE FRASER, *dissenting*.

Before PRINCE, J., Greenwood, April, 1913. Affirmed.

Action by McNary Cochran against the Greenville, Spartanburg & Anderson Railway for alleged trespasses committed upon plaintiff's land after entry under a grant of easement fraudulently obtained. From a judgment on order for nonsuit, plaintiff appeals.

Mr. Wm. N. Graydon, for the appellant, cites: *Testimony sustained allegation that deed to right of way was obtained by fraud*: 71 S. C. 528, 146, 150; 78 S. C. 430; 94 S. C. 312; 2 Hill L. 657; 93 S. C. 397; 67 S. C. 122.

REF.]

November Term, 1918.

*Messrs. Osborne, Cocke & Robinson, and Featherstone & McGee, for respondent, cite: Deed must be set aside to allow recovery: 94 S. C. 425. Consideration for deed must have been returned before suit: 56 S. C. 508; 61 S. C. 488; 84 S. C. 44, 278; 71 S. C. 147; 131 Am. St. 346; 137 Am. St. 301, 302; 50 Am. Dec. 674, note; 74 Am. Dec. 661, note; 67 S. C. 126.*

April 2, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

The defendant company built an electric railroad in front of the plaintiff's house, took up for that purpose about one half acre, and there made a cut of some eight or ten feet.

Therefor, plaintiff sued the defendant for damages.

The defendant set up a deed to it by the plaintiff, wherein it is written: "to make all necessary cuts and fills, and to do any and all acts necessary or appropriate for any proper purposes connected with said road or line."

For that deed defendant paid the plaintiff one hundred (\$100.00) dollars.

The contention of the plaintiff below, and now is, that before deed was made, defendant, in order to procure its execution, "falsely and fraudulently assured the plaintiff that said road would run a grade through his land \* \* \* he being assured that the building of said road would not injure the property of the plaintiff (and) would be built on top of the ground."

The contention of the defendant below, and here is, that the plaintiff has the unquestioned right to prove that the defendant deceived the plaintiff, and that the clause in the deed aforementioned ought therefore not to conclude the plaintiff; but that before plaintiff can make that issue of fact, he must return to the defendant the one hundred (\$100.00) dollars paid aforetime.

That is the real issue of law in the case.

It is true the action is not to vacate the deed; but it is to vacate a material clause in the deed, to wit: the clause with reference to making a cut. No other part of the deed, except that is challenged; the plaintiff is willing for a grant of a right of way to stand, but he wants larger compensation therefor than was paid to him, and because the construction of the road was not according to his understanding. That part of the deed he may undo; but he must undo also that which the defendant did towards payment. Nobody wants to restore the status; that cannot be done now. But this much can be restored, which is enough; what was the agreement; was there fraud; and if so, what compensation is due the plaintiff for the construction that was done, and in the way it was done?

In our judgment, the issue now made has been heretofore decided, and that decision was the warrant of the Circuit Court to grant the nonsuit. *Levister v. R. R.*, 55 S. C. 508, 35 S. E. 307.

The order below is affirmed.

MR. JUSTICE FRASER, *dissenting*. I cannot concur in the opinion of the majority of the Court.

In *Black v. Simpson*, 94 S. C. 314, 77 S. E. 1024, 46 L. R. A. (N. S.) 137, this Court says:

"But even if the property were still in the hands of the defendant, it is elementary that the plaintiffs could either tender back the price paid and demand a rescission, or they could elect to let their transfer to the defendant stand and bring their action to require him to account for the true value of the property acquired at less than its true value by false representation in breach of his trust." This is not an action for rescission, but damages for the fraud.

The *Levister* case, 56 S. C. 508, 35 S. E. 207, was a suit for damages for personal injury. There is always an element of doubt as to whether the party injured is entitled

to anything or not. It would be manifestly unfair to allow the plaintiff to retain doubtful money and then bring suit for more, for, as was said in that case (56 S. C. 513, 35 S. E. 209), "on the theory upon which he proceeds, the money which he retains is not his money." Here, however, the defendant has the plaintiff's land and does not claim to have paid too much for it. The sole question is the excess. Why should the plaintiff return money to which his right is unquestioned? I think the Black case, and not the Levister case, applied here.

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8778*EX PARTE FINLEY IN RE SIMS.*

(81 S. E. 279.)

**ATTORNEY AND CLIENT. SUSPENSION AND DISBARMENT.**

The soliciting of business by an attorney at law in an unprofessional manner, his acceptance of a fee and subsequent desertion of his client, and the possession of a reputation for truth and integrity unworthy of a member of the bar, shows him to be unfit to practice as such attorney, and authorizes his indefinite suspension, with privilege to move for reinstatement after a prescribed period, on proof of reformation and possession of proper qualifications.

Petition in the original jurisdiction, by S. G. Finley, Esq., a member of the bar, for an investigation of certain charges therein contained relative to the professional conduct and character of C. P. Sims, Esq., also a member of the bar.

Proceedings on rule to show cause, issued against C. P. Sims, respondent. Suspended.

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**FOOTNOTE**—On question of withholding client's money as ground for disbarment, see 19 L. R. A. (N. S.) 414. As to constitutionality of statutes relating to disbarment of attorneys, see note in 44 L. R. A. (N. S.) 1195.

*Mr. Solicitor Henry* appeared *amicus curiae*, and conducted the examination of witnesses.

*Messrs. Ralph K. Carson, S. G. Finley, L. K. Jennings, J. W. Nash, L. W. Perrin, J. H. Brown, Thos. W. Lyles, J. B. Gwinn, R. H. Hannon, C. E. Daniel, H. E. Ravenel and J. C. Otts*, of the Spartanburg bar, appeared for the petitioner.

*Messrs. Nicholls & Nicholls, W. M. Jones and C. C. Wyche*, appeared for the respondent.

April 2, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

The petition herein alleges, that both the petitioner and C. P. Sims, Esq., are now and at the times hereinafter mentioned, were members of the bar, duly admitted by the Supreme Court to practice law in this State, residing and having offices in the city of Spartanburg, in said county and State.

After alleging that C. P. Sims, Esq., had made certain specified charges against said petitioner whereby "the integrity and professional character and conduct of your petitioner has been falsely, unjustly, wrongfully and wilfully assailed, without any reason, cause or excuse," prayed that inquiry be made into the truth of the said allegations by this Court.

The petitioner also prays "that the professional conduct of the said C. P. Sims, Esq., be investigated by this honorable Court, as to certain matters touching the professional practices, and the integrity and character of the said C. P. Sims, Esq., be examined into by this honorable Court, and prefers, upon information and belief, the following charges, to wit:

(a) "That the said C. P. Sims, Esq., wilfully attempted to impose upon, mislead and deceive this honorable

Supreme Court in the case of *State v. John Shelton*, reported in Volume 77 of the South Carolina Supreme Court Reports, page 74 (57 S. E. 1111), and thereafter attempted to procure I. C. Blackwood, Esq., also an attorney of this bar, to secure from R. A. Hannon, Esq., also an attorney of this bar, a false affidavit for the purpose of further deceiving and misleading the said honorable Supreme Court, as shown by affidavits on file in the Supreme Court, in the case of *State v. John Shelton*, made by C. P. Sims, Esq., on the ninth day of July, 1906, and on the twenty-eighth day of February, 1907, and the affidavit of Honorable T. S. Sease, Solicitor (now Circuit Judge), made on the twenty-ninth day of April, 1907, and further the affidavits of I. C. Blackwood, Esq., and R. A. Hannon, Esq., both of whom are attorneys of this honorable Court, made on the eighteenth day of May, 1907, the last two affidavits not being before the Supreme Court in the hearing of the said case, copy of these affidavits being hereto attached and made a part of this petition. (Exhibits 1-A, 2-A, 3-A, 4-A, and 5-A.)

(b) That the said C. P. Sims, Esq., did solicit a suit against the city of Spartanburg, by going to Mrs. R. F. Ferguson and her husband, R. P. Ferguson, and requesting them to bring suit against the city of Spartanburg, along with others, and also fraudulently collected certain moneys from the said Mrs. R. P. Ferguson, on account of said alleged action, and thereafter fraudulently failed to bring any suit, as shown by affidavits of Mrs. R. P. Ferguson and Richard P. Ferguson, hereto attached and made a part of this petition. (Exhibits 1-B and 2-B.)

(c) That the said C. P. Sims, Esq., solicited one Richard Jackson to employ him to defend said Richard Jackson and his wife, Henrietta Jackson, before the Court of General Sessions, for Spartanburg county, and collected a fee of ten (\$10.00) dollars therefor, after taking said employment, although advised that the said Richard Jack-



son had already employed another attorney to defend him, and failed and refused to defend the said Richard Jackson and his wife, Henrietta Jackson, at the next term of Court, leaving them without an attorney, although he had been fully paid according to his contract and was to defend the same, as shown by affidavits of the said Richard Jackson and his wife, Henrietta Jackson, hereto attached and made a part of this petition. (Exhibits 1-C and 2-C.)

(d) That the said C. P. Sims, Esq., solicited one Tom Jackson and L. M. Jackson to employ him to bring an action against the town of Wellford, touching a certain fine imposed upon the said Tom Jackson by the town of Wellford, and collected a fee of ten (\$10.00) dollars therefor, wilfully refused to bring said action, and took no steps to bring such action, well knowing at the time he solicited the fee and employment that no cause of action existed against the town of Wellford, as set out by the affidavits of Tom Jackson, L. M. Jackson, Alice Jackson, and W. G. Querry, hereto attached and made a part of this petition. (Exhibits 1-D, 2-D, 3-D and 4-D.)

(e) That the said C. P. Sims, Esq., solicited employment by one Belton R. Dryman, in a suit against the Southern Railway Company, and secured one D. H. Hunsinger to go and intercede with the said Belton R. Dryman to employ the said C. P. Sims, Esq., promising and agreeing to divide his fee with the said D. H. Hunsinger, which he fraudulently refused to do, well knowing that the same was illegal and unprofessional, as set out by the affidavit of D. H. Hunsinger, attached hereto and made a part of this petition. (Exhibit 1-E.)

(f) That the said C. P. Sims, Esq., accepted a fee of ten (\$10.00) dollars from Mrs. M. E. Thomas to secure a pardon for her son, Baxter Thomas; after seeing the said Mrs. M. E. Thomas and securing her money aforesaid, he did wilfully and fraudulently desert the cause of his client, and advised the Governor of the State not to

REP.]

November Term, 1918.

issue the pardon, in breach of his duty to his client, as shown by affidavit of Mrs. M. E. Thomas, hereto attached and made a part of this petition. (Exhibit 1-F.)

(g) That the said C. P. Sims, Esq., visited the county jail frequently, soliciting criminal business and solicited one J. B. Blanton, a United States prisoner in the county jail for said county and State in February, 1911, to employ him to secure a pardon for the said J. B. Blanton from the President of the United States, and got the said J. B. Blanton to pay him a fee of ten (\$10.00) dollars therefor, and then wilfully deceived and betrayed the said J. B. Blanton, as shown by affidavit of the said J. B. Blanton, hereto attached and made a part of this petition. (Exhibit 1-G.)

(h) That the said C. P. Sims, Esq., solicited suit of one Robert Whitesides against the Southern Railway Company and that, when told by the said Robert Whitesides that he had already retained attorneys for said suit, he told the said Whitesides that he could get the money for him simply by writing a letter, all of which was unethical and highly improper for a member of the bar, as set out in the affidavit of Robert Whitesides, hereto attached and made a part of this petition. (Exhibits 1-H and 2-H.)

(i) That the said C. P. Sims, Esq., solicited the employment of Mrs. W. J. Fonville, to bring action against the Southern Railway Company for the death of her husband, and advised her by letter that he was in position to secure for her ten thousand (\$10,000.00) dollars, well knowing that he had no connection with the Southern Railway, and did not represent them in any manner whatsoever, all of which was highly improper and unprofessional for a member of the bar, as set out by letter from the said C. P. Sims, Esq., to Mrs. Fonville, hereto attached and made a part of this petition. (Exhibit 1-I.)

(j) That the said C. P. Sims, Esq., bargained for the sale of a house and lot in the city of Spartanburg to Dr. Webb Thompson, and after closing the trade for said sale,

secretly executed a mortgage on the same house and lot for the sum of fifteen hundred (\$1,500.00) dollars, with the purpose of keeping said mortgage off record for thirty-nine days, and until after the title of the same had been examined by attorney for Dr. Webb Thompson and passed, and then to record said mortgage and defraud the said Webb Thompson out of fifteen hundred (\$1,500.00) dollars, as shown by affidavit of Dr. Webb Thompson, hereto attached and made a part of this petition. (Exhibit 1-J).

(k) That the said C. P. Sims, Esq., having for collection an account of Charlotte Brick Company against W. P. Maner & Company, of Spartanburg, South Carolina, presented the said account to the said debtors, and accepted certain amounts of lumber and building materials, agreeing to pay the said account to the said Charlotte Brick Company, which he wilfully and fraudulently refused to do, as shown by letters of the Charlotte Brick Company, and affidavits of the account hereto attached and made a part of this petition, and that of W. P. Maner. (Exhibits 1-K, 2-K, 3-K and 4-K.)

(l) That the said C. P. Sims, Esq., secured a fee of ten (\$10.00) dollars from Harrison & Harrison, attorneys for the O. K. Stove and Range Company, for the purpose of bringing suit against one W. H. Burris in the town of Union in said State, and wilfully refused to file suit and did fail to file suit, giving as his reason that there was some legal question as to appointment of magistrates, and has never brought said suit or tried to collect said debt, as shown by affidavit of J. Frost Walker, Esq., and B. O. Harrison, W. H. Burris, and letters of Sims and Von Nunes, hereto attached and made a part of this petition. (Exhibits 1-L, 2-L, 3-L, 4-L, 5-L, 6-L, 7-L and 8-L.)

(m) That the said C. P. Sims, Esq., fraudulently retained twenty (\$20.00) dollars collected for N. L. Hawkins, a client of the said C. P. Sims, Esq., and denied to said Hawkins that he had collected the same, as shown by

affidavits of N. L. Hawkins and J. H. Simmons (Exhibits 1-M and 2-M), and that Magistrate R. J. Gantt is a witness therein.

(n) That the character and reputation of the said C. P. Sims, Esq., for truth, honesty and integrity are bad and unworthy of a member of the bar of this honorable Court, as shown by affidavits hereto attached, to wit: Magistrate A. H. Kirby, John F. Floyd, W. B. Harrison, B. T. Earle, C. M. Justice, W. W. Lancaster, Thad. C. Dean, S. C. Thomas *et al.*, who are not attorneys, and, further, the affidavits of T. M. Lyles, R. A. Hannon, L. W. Perrin, I. C. Zimmerman, J. B. Gwynn, C. E. Daniel, L. K. Jennings and other members of this bar.

(c) That by reason of his unprofessional conduct heretofore the said C. P. Sims, Esq., was, for a while, suspended from practicing law by one of the honorable Circuit Judges of this State, while holding Court at Spartanburg.

The following are named as attorneys representing the petitioner: Ralph K. Carson, L. K. Jennings, L. W. Perrin, J. H. Browne, Thomas W. Lyles, J. B. Gwynn, S. G. Finley, J. W. Nash, R. H. Hannon, C. E. Daniel, H. E. Ravel, J. C. Otts.

The Court ruled that in this proceeding, the investigation would be confined to the alleged charges of unprofessional conduct against C. P. Sims, Esq.

We shall not undertake to pass, specifically, upon every one of the charges hereinbefore mentioned, as it would subserve no useful purpose.

*First.* We find as a fact that C. P. Sims, Esq., was unquestionably guilty of the charge of soliciting business as an attorney, in a manner violative of professional ethics. It is only necessary to refer to the testimony, taken upon the trial of this case (which, of course, will be filed with the clerk of the Supreme Court), to show that this finding is fully sustained by the testimony.

*Second.* We find as a fact that the charge contained in "f" is fully sustained by the testimony, especially the testimony of John F. Floyd, which was as follows:

Direct examination by Mr. Solicitor Henry:

"Q. Mr. Floyd, you are mayor, I believe, of Spartanburg? A. Yes, sir. Q. Mr. Floyd, do you know anything about this pardon of Mrs. Thomas' boy; did you give her any information about that pardon? A. About a pardon? Q. Yes, sir; attempted pardon of her son? A. Mrs. Thomas came to me last year in regard to Baxter's being on the gang, and wanted to get a pardon for him, and I asked Mrs. Thomas, who was looking after her interest, and she said Sims, and I told her: 'Don't you let him look after it.' And she said: 'I have already paid him for getting a pardon, and I want you to tell me what to do.' And she said: 'You go to Columbia often.' And I said: 'The next time I go to Columbia I will take the matter up with Governor Blease.' And I called on Governor Blease and told him: 'Governor, what are you going to do about Baxter Thomas' pardon? And the Governor ran his hand through his hair and said: 'I got a letter from Sims saying not to pardon Baxter, he is a sort of a bad case.' And he brought out a letter from Sims, and I saw a letter from Sims to Governor Blease, advising him not to pardon him. Q. Did you advise Mrs. Thomas of that? A. I went back and told Mrs. Thomas that Sims was double-crossing her. She said: 'What is that?' I said: 'He advised you one thing and told the Governor another thing. He told the Governor not to pardon this boy.' And she said: 'I am going to take a stick and go up there and whale him out of his office.' And I said: 'That would be a pretty good way to treat him.' Mr. Justice Hydrick: Mr. Solicitor, there is one question I would like to ask Mr. Floyd. You say, when the Governor got his file out and showed you this letter, you saw the letter yourself? The witness, Mr. John F. Floyd: I did; yes, sir. Mr. Justice Hydrick: You know

REF.]

November Term, 1918.

Mr. Sims' handwriting? The witness, Mr. Floyd: Yes, sir. Mr. Justice Hydrick: Was it his handwriting? The witness, Mr. Floyd: It was."

*Third.* We are constrained to find as a fact, that the charge in "n" is sustained by the testimony.

We feel, however, that the conduct of the respondent was due, in large measure, to his misconception as to the nature of the legal profession, and of his duties to the Court, to his brother lawyers, and to his clients, as will be seen from the testimony of Robert T. Gantt, Esq., who was called as a witness by the respondent:

Cross-examination by Mr. Solicitor Henry:

"Q. What is his general reputation? Do you know his general reputation in Spartanburg? A. I think so, sir. Q. Well, now, as to truth and veracity as a man—you spoke about him only as an attorney; is that reputation good or bad? A. Well, sir, it is hard to say. He is a man of very decided character, and his friends are very loyal to him. His enemies speak very bitterly about him, very harshly. You strike his friends and they are very loyal to him. And I hear his enemies were very hard on him. If I am permitted to state it generally, I want to state this, that Mr. Sims came to the bar at Spartanburg after he was grown. He didn't have the benefit of legal education, and when he first came there his ideas of judicial ethics were very crude. A man who has not had the legal education, legal training, as the bar knows, sometimes don't get the right idea as to the obligations that they owe to brother attorneys, and that they owe to the Courts, and that he looks more or less upon the practice of law as a trade, rather than a profession. And that has been the defect in Mr. Sims' career from the beginning."

The foregoing findings of fact show that C. P. Sims, Esq., is unfit to practice law as an attorney. The Court, however, is of the opinion that the respondent should be allowed the opportunity to reform and be reinstated, upon

proof that he has become duly qualified in every respect, to practice law as an attorney.

It is therefore the judgment of this Court that C. P. Sims, Esq., be indefinitely suspended and forbidden to exercise the rights and duties of an attorney in the Courts of this State with the privilege, however, to move before this Court for reinstatement after the expiration of two years, upon satisfactory proof that he has reformed, and at that time is duly qualified in every respect to practice as an attorney at law.

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8779MUCKENFUSS *ET AL.* *v.* ATLANTA & C. A. L. RY. CO.

(80 S. E. 460.)

## RAILROADS. FIRES. PLEADING.

The refusal of a motion to require complaint to be made more definite and certain so as to state from what engine or engines the sparks of fire escaped, or whether it was from a freight or passenger train, the direction in which it was going, also what officer or agent of defendant knew or consented to the placing of the property which was destroyed upon its right of way, and when such consent was given, and the particular items of the property destroyed and the value of each item, was not an abuse of discretion on part of the trial Court.

Before MEMMINGER, J., Spartanburg, March, 1913.  
Appeal dismissed.

Action by S. V. Muckenfuss and another, copartners doing business under the firm name of the Muckenfuss Manufacturing Company and certain insurance companies, against Atlanta and Charlotte Air Line Railway Company and Southern Railway Company, on two causes of action, one under the statute, 1 Code of Laws, 1912, sec. 3226, to recover damages for the loss of property belonging to the plaintiffs, Muckenfuss Manufacturing Company, by fire, which it is alleged escaped from one of the engines

of the defendants, which property it was alleged was lawfully on the right of way of the defendants, by and with their knowledge and consent. The other cause of action was at common law to recover damages for the destruction of the same property on account of the negligence of the defendants in failing to use proper appliances to prevent the emission of sparks from their locomotive engines.

The third paragraph of the statutory cause of action alleged:

"3. That in the year — the Muckenfuss Manufacturing Company, with the knowledge and consent of the defendants, built and constructed a large and commodious broom factory partly on the right of way of said defendants, in the city of Spartanburg, in the State aforesaid, purchasing and installing the necessary machinery for the large factory, which they operated as such until the 17th day of November, 1909, at which time, while said factory was full of machinery and supplies of a costly character, and lawfully located on the right of way of said defendants, a fire was communicated by and from the defendants' locomotive engines on said railroad to said property, in consequence of the acts of some of the said defendants' authorized agents or employees, and totally destroyed the same, and the loss and damage sustained by the said Muckenfuss Manufacturing Company was to the amount of \$19,900.28, to wit: the sum of \$4,160.70 on said building, the sum of \$2,292.00, the value of the machinery, and the sum of \$13,448.08, the value of its stock on hand, and other contents, for which said defendants are responsible and liable to the said plaintiffs, under the provision of sec. 2135, vol. I, of the Code of 1902, or sec. 3226 of vol. I of the Civil Code of 1912."

The third paragraph of the common law cause of action alleged:

"3. That in the year — the said Muckenfuss Manufacturing Company, with the knowledge and consent of the



defendants, built and constructed a large and commodious broom factory partly on the right of way of said defendants in the city of Spartanburg, county and State aforesaid, purchasing and installing the necessary machinery for the large factory, which it operated as such until the 17th day of November, 1909, when the defendant corporations by their agents, servants or employees, jointly and concurrently, carelessly and negligently omitted to use proper appliances to prevent the emission of sparks from the locomotive engines used in operating said roads and in running said engines over said road, and to keep the fire boxes and ash pans in proper condition, and in jointly and concurrently and negligently permitting and causing said locomotives to emit and let out sparks of fire, which fell upon said property and ignited and spread over the same and burned and totally destroyed the same, and the loss and damage sustained by the said Muckenfuss Manufacturing Company was to the amount of nineteen thousand nine hundred and 28-100 (\$19,900.28) dollars, to wit: the sum of four thousand one hundred sixty and 70-100 (\$4,160.70) dollars on said building, the sum of two thousand two hundred ninety-two (\$2,292) dollars, the value of the machinery, and the sum of thirteen thousand four hundred forty-eight and 08-100 (\$13,448.08) dollars, the value of its stock on hand, and other contents."

The defendants moved for an order requiring the complaint to be made more definite and certain in the following particulars:

1st. By alleging in the third paragraph of the first cause of action and in the third paragraph of the second cause of action what engine or engines sparks of fire escaped, or emitted from, or at least by stating whether it was a freight or passenger train, the direction in which it was going and at or about what hour the sparks escaped from said engine.

2d. By alleging and stating in the third paragraph of the first cause of action, and also in the third paragraph of the second cause of action what officer or agent of the defendant company knew or consented to the placing of the property upon its right of way which it is alleged was destroyed by fire escaping from the engine of the defendant, and stating when such consent was given.

3d. By alleging particularly and giving the particular items of property which was destroyed by fire and when the same was placed upon the right of way and what officer or agent of the defendants consented to its being so placed, and when such consent was given.

4th. By alleging and stating which particular piece of machinery which it is alleged was destroyed by fire, when the same was placed upon the right of way, and also by giving the items constituting the stock on hand and other contents which it is alleged was destroyed by fire, giving the value of each item and when the same was placed upon the right of way of the defendants.

The trial Judge required the third paragraph of each cause of action to be made more definite, by alleging, within six hours, reasonable limits, the time when the sparks escaped; and refused the motion in all other respects. From this refusal the defendants appeal.

*Messrs. Sanders & DePass and B. L. Abney*, for the appellant, cite: *Discretion must be governed by rule*: 47 S. C. 498; 15 S. C. 328; 60 S. C. 140; 68 S. C. 37; 94 S. C. 17.

*Messrs. John T. Seibels and Stanyarne Wilson*, for respondents, cite: *Motion properly refused*: 79 S. C. 469; 81 S. C. 355; 65 S. C. 224; 66 S. C. 17; 91 S. C. 424.

April 2, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This appeal is from an order of the Circuit Judge refusing a motion to require the complaint to be made more definite and certain in the particulars mentioned in the notice of motion.

The authorities cited in the brief of the respondents' attorneys fully sustain the ruling of the Circuit Court.

Appeal dismissed.

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8780

SANDERS v. CHARLESTON & W. C. RY.

(81 S. E. 288.)

**MASTER AND SERVANT. FEDERAL EMPLOYERS' LIABILITY LAW. APPLICABILITY.**

A railway employee, who is within the Federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stats., 65 U. S. Comp. St. Supp., 1911, p. 1822), while actually engaged in relaying rails on a line of railway is also within the act while asleep at night in a shanty car of a train on a sidetrack, placed there for the accommodation of such employees, and he may recover for injuries sustained in consequence of the shanty car being struck by another train.

Before BOWMAN, J., March, 1913. Affirmed.

Action by W. L. Sanders, a foreman of a rail gang, employed by Charleston & Western Carolina Railway Company in repairing its track and roadbed. While asleep in one of a train of shanty cars intended for use of such gang and left standing on a side track, plaintiff was injured by the negligent movement of the shanty cars by a passing train of defendant. From a judgment for plaintiff, defendant appeals.

*Messrs Sheppard Bros. and F. R. Grier, for appellant.*

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FOOTNOTE—As to the effect upon master's liability for breach of statutory duty of fact that employee was resting at the time of injury, see note in 22 L. R. A. (N. S.) 309. And on the general question of injury to servant on master's premises before, after, or between hours of work, see notes in 12 L. R. A. (N. S.) 858, and 23 L. R. A. (N. S.) 954.

REP.]

November Term, 1918.

*Mr. Grier cites: Was plaintiff at the time engaged in interstate commerce? . . .* 52 L. Ed. (U. S.) 297; 56 L. Ed. (U. S.) 327; 229 U. S. 146; 33 Sup. Ct. Rep. 648; 57 L. Ed. 1125; 63 S. C. 370.

*Messrs. N. G. Evans, J. W. Thurmond and B. E. Nicholson, for respondent, cite:* 56 L. Ed. (U. S.) 347; 91 U. S. 275; 190 U. S. 197; 179 Fed. 893; 2 L. R. A. 839; 18 S. W. 219; 33 N. E. 345; 41 N. E. 105; 55 L. Ed. (U. S.) 590; 31 Mont. 272; 108 Pac. 1062; 57 L. Ed. 648; 196 Fed. 336.

April 2, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

Plaintiff sued defendant for damages to the person, and had a verdict for \$750.00 The defendant appeals.

The defendant's line of road runs, in part, from the city of Augusta, Ga., to Port Royal, S. C. The plaintiff was injured in the night time on the line of that road in Barnwell county, S. C., while asleep in the bunk of his shanty car, on a train which stood on a sidetrack, and by an incoming special freight train running east.

The plaintiff sued under that act of Congress called Employers' Liability Act. He charged that defendant was, at the time of the injury, engaged in interstate commerce, and that the plaintiff was with an iron gang relaying rails on the line of railway, and had been so engaged for some weeks.

Appellant's counsel begins his argument with this statement: "We shall not undertake to consider our exceptions separately. These exceptions present to the Court but a single proposition." And, further: "It may be conceded, if the plaintiff in this case had been actually engaged at work in relaying the rails at the time of his injury, that he would fall within the protection of the act of Congress." Thus the issue made here is narrow and clear cut. The admission of counsel was frankly expressed to be the result

of the opinion in *Pedersen v. Del. & L. W. Ry. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. ed. 1125, a late case before the United States Supreme Court.

The appellant cites no case to sustain his contention, to wit, that because the plaintiff was not actually engaged in laying rails at the time of the injury, he does not come within the purview of the act of Congress. The case he does cite (*Davis v. Railroad*, 63 S. C. 370, 41 S. E. 468) is not conclusive of the issue made here, nor a parallel case to this.

When the plaintiff was in the bunk of his shanty car, in the "sleep that knits up the ravell'd sleeve of care," and getting strength to lay rails next day, the law imputed to him actual service on the track, and extended to him the rights of such a worker; "for the letter (of the law) killeth, but the spirit giveth life."

The judgment below is right, and is affirmed.

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8783

NEW ENGLAND NATL. BANK v. WALLACE ET AL.

SAME v. SAME.

(80 S. E. 460.)

NEGOTIABLE INSTRUMENTS. INNOCENT HOLDER. DIRECTION OF VERDICT. Where the testimony of plaintiff that it is a holder for value in due course of business before maturity of a negotiable instrument, without notice of any fraud or infirmity affecting it, is undisputed, and only one inference can be drawn therefrom; verdict was properly directed in its favor.

Before DEVORE, J., Charleston, April, 1913. Affirmed.

Actions by the New England National Bank against J. V. Wallace and others, on two negotiable notes, tried together.

On the close of the defendants' testimony, the plaintiff moved for a direction of a verdict on the following grounds:

Plaintiff moved for the direction of a verdict in both of these cases against all of the defendants, except the defendant Nolte, on the ground that the testimony shows that the plaintiff is a *bona fide* holder for value without notice of any defect, without notice of any fraud in the contract, without notice of any so-called guarantee, and that the defendants have failed to introduce any testimony whatever tending to show that the plaintiff had notice. The Court, in directing verdict for plaintiff, said:

"The undisputed evidence is that the notes sued upon here are negotiable notes, there is not the slightest doubt about that; that these notes were found in the possession of the plaintiff and sued on by the plaintiff as their property; the endorsement on the back of these notes show that McLaughlin Bros. transferred them to the plaintiff in due course of business; all of that testimony is in writing. The plaintiff in this case went further than the law requires him to go in proving his case. It has been the law, according to my understanding, ever since anything has ever been said about negotiable paper, that the possession to the paper and the title to the paper were inseparable, those things go together, and if the plaintiff had put these two notes in that would have been sufficient to have made out a *prima facie* case; the plaintiff could have done that and said, 'I rest,' but the plaintiff went further than the law required him to go, he went on to prove how he came in possession of these notes, and that testimony is absolutely undisputed. These notes were bought at the time and in connection with a number of other notes, all of which cost \$50,000, that is undisputed.

"Now the Supreme Court laid down this proposition of law: 'No point was made either here or on circuit as to where lies the burden of proof in a case like this, where

it is shown by defendant that the note had its inception in fraud. The defendant seems to have voluntarily assumed the burden of proof, while the authorities elsewhere are not entirely in accord. Our own cases, and the greater weight of authority in other jurisdictions, agree that when the defendant shows fraud or irregularity in the inception of paper or where it is lost or stolen from the owner, the presumption which is raised by its mere possession is overcome and the burden then shifts to the holder to show that he acquired it in good faith for value before maturity, in the usual course of business and under circumstances creating no presumption that he knew of the fraud or other defect in title.' *Bank v. Stackhouse*, 91 S. C. 455, 74 S. E. 977, 40 L. R. A. (N. S.) 454

"That proposition of law would have been applicable in this case if the plaintiff, as I have stated, had simply introduced these notes and had done nothing else, showing that he was in possession by the mere possession, but he goes further than that, he showed how he came in possession of them. He says: 'I bought these notes in connection with a number of other notes, all of which cost me \$50,000;' that testimony is undisputed, not a scintilla of testimony here disputing that testimony on the part of the plaintiff. Again, if there had been fraud in the inception of this note, upon whom was the fraud perpetrated? Upon the people who signed that agreement to become stockholder, and it was not perpetrated on them by the bank; on the other hand, here is a negotiable paper put in circulation, a passenger going through the commercial world without any baggage, no notice to anybody that there was anything wrong about it. There is not a scintilla of testimony here to show that the plaintiff bank in this case had any notice of what had taken place between these parties, the defendants and McLaughlin Bros., and according to my judgment, under this undisputed evidence, the defendants in this case have failed to make out their defense, and the

bank is entitled to have me direct the jury to bring in a verdict for the plaintiff on the whole case."

From the judgments entered upon the verdicts directed, the defendants appeal.

*Messrs. Von Kolnitz & Von Kolnitz*, for appellant, cite: *Issue of good faith should have been submitted to the jury*: 77 S. E. 977; 29 L. R. A. (N. S.) 638; 151 Mo. 86; 131 S. W. 728. *Was note negotiable?* 12 Rich. L. 446. *Discounting*: 112 N. W. 1000; 12 Pick. 399; 45 Mo. 104; 19 How. Pr. 51; N. Y. Supp. 328; 2 McC. 388.

*Messrs. Smythe & Visanska*, for respondent, cite: 91 S. C. 455, 462. *Negotiability*: 2 S. C. 248; 72 S. C. 362. *Purchase for value*: 1 Pac. 789; 19 S. E. 561; 92 N. W. 348; 106 N. W. 942; 142 N. W. 139; 129 Pac. 798; 47 N. E. 196; 26 S. W. 975; 91 S. C. 305; 78 S. C. 408, 412, 413; 24 Atl. 356.

April 6, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

When the case of *Bank v. Stackhouse*, 91 S. C. 455, 74 S. E. 977, 40 L. R. A. (N. S.) 454, was decided by this Court, it did not seem to the writer of this opinion that the plaintiff therein, was *prima facie* a *bona fide* holder of the note upon which the action was brought.

The principles then announced are practically the same as those involved in the present case. He, therefore, feels constrained to follow that case as an authority as long as it remains of force.

Judgment affirmed.



8785

EX PARTE TOWNES.

ROGERS v. TOWNS.

(81 S. E. 278.)

MAGISTRATES. JURISDICTION. RESIDENCE OF PARTIES. WAIVER OF OBJECTION.

Failure of a defendant residing in one county, personally served with summons before a magistrate of an adjoining county in an action for claim and delivery of personal property within the territorial jurisdiction of such magistrate, to appear and object to the jurisdiction of the magistrate, waives want of jurisdiction over him, and a default judgment against him in such action is valid.

MR. JUSTICE FRASER *dissents*.

Before BOWMAN, J., Walhalla, July, 1913. Affirmed.

Motion in Court of Common Pleas to vacate and set aside judgment rendered in magistrate's Court, refused. Defendant appeals.

*Messrs. Shuman & Townes*, for appellant, cite: 73 S. C. 111, 112; 71 S. C. 1; 57 S. C. 14; Code Civ. Proc., sections 227, 257; Const. V. 23.

*Mr. J. R. Earle*, contra, cites: 87 S. C. 101; Code Civ. Proc. 172, 173.

April 8, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

Rogers sued Townes in claim and delivery in a magistrate's Court, in Oconee. Townes did not appear, though she had notice to do so, and judgment went against her. Townes resides then and now in Greenville. Thereafter Townes moved in the Circuit Court of Oconee, whence the judgment had been docketed, to vacate it. The motion was denied and Townes appeals here. The order of the Circuit Court is not printed in the case.

The sole contention made in the exceptions and argument is, that a magistrate's Court in Oconee had no juris-

diction to hale the defendant before it, and the judgment of a magistrate in such a case is void. It is assumed the Judge below was deciding that issue when the order appealed from was made.

The power and duty of a magistrate in such a case is prescribed by the Constitution, and by the Code of Procedure. Const. 1895, art. V, sec. 23.

It was so prescribed by the Constitution of 1868. Art. IV, sec. 24.

By the Constitution, the action ought to have been "brought before a magistrate in the county where the defendant resides."

That section of the Constitution has been construed already. *Dill v. Durham*, 56 S. C. 425, 35 S. E. 3.

Had the defendant appeared in a magistrate's Court in Oconee and challenged the jurisdiction of that Court to try the cause, it would have been the duty of that Court to do one of two things, to dismiss the suit, or to remove it to a magistrate's Court in Greenville, there to be tried.

But the defendant did not appear, and the issue now made is this: What is the status of the judgment, and that means, could and did the defendant waive her right to demand that the cause be tried in Greenville, and thereby render the judgment good? The issue is determinable, the Court has held, by the terms of the Constitution; by sections 172-176 of the Code, and by the laws of waiver.

The mandate of the Constitution is not different in obligation from that of the statute, unless the statute prescribed a rule repugnant to the Constitution.

Jurisdiction is a barren tree; it brings no fruit to perfection, but casts it out of time; and judgments sustaining the plea of a lack of it are apt to bring reproach upon the administration of the law. Where, however, the plea is made at the threshold of the contest, it is timely and must and should be sustained.

But if a controversy be fought out by two litigants, each thinking he is on the right side of a line, it often turns out to be no fight, because the litigants ought to have been on the other side of the line.

That is jurisdiction. Sometimes, indeed, where title to land is involved, and succeeding and public interests demand that the record must be in a particular county, to wit, the county where the land lies, the contest must be had in that county. Such an instance was *Silcox v. Jones*, 80 S. C. 484, 61 S. E. 948.

But even there, an order to transfer the evidence of the fight to the right county, would save jurisdiction the fruits of the fight.

In the case at bar, if the defendant had appeared in Oconee, and contested the plaintiff's case, then plainly she would have waived her right to a trial in Greenville.

The right to be sued in one's own county, when the subject of the action is not real property or personal property which has been distrained, is altogether personal, and being so, the person may waive it, the matter concerns none else.

Here, there was, of course, no land in controversy; and there was no distrained personal property in controversy; the magistrate had jurisdiction in claim in delivery for a lot of hay; he was only denied jurisdiction of the person of the defendant; and if she should give that, the magistrate might proceed. See *Baker v. Irvine*, 62 S. C. 299, 40 S. E. 672; *Garrett v. Herring*, 69 S. C. 278, 48 S. E. 254; *Jenkins v. R. R.*, 84 S. C. 344, 66 S. E. 409; *Duncan v. Duncan*, 93 S. C. 493, 76 S. E. 1099.

The cases in this State show that two views on the subject of jurisdiction and waiver have contended for the ascendancy. That appears in the case of *Jenkins v. R. R.*, 84 S. C. 344, 66 S. E. 409, decided by the Court *en banc*.

Perhaps the case that went furthest to follow the letter of the law, and thereby sustain the plea of lack of jurisdic-

tion, is *Bell v. Fludd*, 28 S. C., 5 S. E. 810, and the case that went furthest to deny the plea is *Garrett v. Herring*, 69 S. C., 48 S. E. 254.

The narrow issue now presented is, has the defendant impliedly waived her right to a trial in Greenville county by merely failing to appear at the trial to challenge jurisdiction?

May implication follow from action or nonaction? Had defendant appeared and answered, the implication would have been she assented to trial in Oconee; had she appeared, and said by the record or by parol, "I consent to a trial in Oconee," that would have been express assent to a trial in Oconee. 40 Cyc., pp. 124-5.

When the nonaction consists in absence and silence, does the implication still arise that defendant assented?

That involves a consideration of a defendant's duty when summoned to appear in a Court of justice.

A Court is presumed to do its duty; and when it, in a good faith which must be presumed, summons the citizen to answer before it, the duty of the citizen is to appear at all events; his failure to appear leads to just such an event as this, a delay in the administration of justice.

A magistrate is not presumed to know the county where a defendant resides; a defendant cannot require the magistrate to play hide and seek about that matter; if the magistrate has made a mistake, the defendant knows and must appear and state the fact; his failure so to appear and state the fact warrants the magistrate to conclude one of two things, either that the defendant has been sued in the county of his residence, or that the defendant assents to suit in the county named as the venue.

This was the view of the Circuit Court; therefore, the judgment below must be affirmed.

MR. JUSTICE FRASER, *dissenting*. I cannot concur. The Constitution does not fix the place of trial of causes in

the Court of Common Pleas, and the legislature, having the right to do anything not forbidden by the Constitution, may fix the place of trial in the Court of Common Pleas.

As to magistrate's Courts, the Constitution does not fix the place of trial. Art. V, sec. 23, says: "Every civil action cognizable by magistrates shall be brought before a magistrate in the county where the defendant resides." It seems to me that the Constitution guarantees to a citizen of Oconee county that he shall not be subject to the magistrate Courts of Charleston county. It may cost him more to defend than to pay the claim. The evil of being carried to a distant magistrate is so great that the legislature has seen fit, in some cases, to divide the counties into subjudicial districts and confine the jurisdiction of the magistrate, in causes to be tried by him, to his own district. But whether the provision be wise or unwise, is not the question. It seems to me that there ought to be some *act* from which an intention to waive might be inferred. There certainly was no waiver of law and there was no act. Jurisdiction is the very life of a Court and a judgment without jurisdiction is void and ought to be set aside.

It seems to me that the opinion of the majority is not in accord with the principle announced in *Williams v. Hatcher*, 95 S. C. 49, 78 S. E. 615. In that case it was held that there was no waiver even though the defendant had given several notices of motions. The motions were not made. There was no actual appearance, and hence no waiver of law. If failure to appear be waiver at all it must be waiver of law. When the same thing is always construed to be waiver, then that thing becomes waiver of law. It is true, *Hatcher* was a nonresident, but the principles are the same. I do not think the laws of South Carolina are more considerate of residents of Georgia than to citizens of South Carolina. A Court is entitled to the respect of its citizens, but it can command it only when the Court itself obeys the law.

Affirmed.

8786

## KIRKLAND v. AUGUSTA-AIKEN RY. &amp; ELECTRIC CORPORATION.

(81 S. E. 806.)

ELECTRIC RAILROADS. INJURIES TO LICENSEE ON TRACK. WILFUL OR WANTON DISREGARD OF DUTY. CONTRIBUTORY NEGLIGENCE. INSTRUCTIONS.

1. Evidence that a proper street car headlight would throw light on the track 200 yards ahead of the car, and that the headlight on the car by which decedent was killed only threw a light for from 35 to 50 feet, made it a question for jury whether or not the railway company was guilty of wilfulness or wanton failure to use a proper headlight and keep a lookout for licensees on its track.
2. In an action for death on a street car track at night, evidence that it was the custom of motormen to eat their meals while running the car, held admissible to show wilful and wanton acts, though no such specific acts of negligence were alleged in the complaint.
8. In an action for damages arising from death in a collision with a street car at night, the Court instructed that, if intestate came to his death through his own negligence plaintiff could not recover, and that, though defendant was negligent, and his negligence concurring with defendant's negligence, contributed as to his injury to any extent as a proximate cause thereof, and without which it would not have happened, plaintiff could not recover, unless defendant acted wilfully or wantonly. The Court further instructed that, while it is the general duty of motormen to exercise ordinary care to avoid injuring persons on the track, it is as much the duty of such persons to exercise reasonable prudence to avoid being injured; so that, if decedent lay down on the tracks in a drunken stupor, or went to sleep thereon, and such acts amounted to negligence, and such negligence concurring with defendant's negligence, "contributed to his injury to any extent as a proximate cause thereof, without which it would not have happened, then plaintiff cannot recover." *Held*, that the instructions sufficiently submitted contributory negligence as a proximate cause of decedent's death, so that further charges requested on contributory negligence were properly refused.

FOOTNOTE—The question of the necessity of headlights on street cars is discussed in a note in 26 L. R. A. 300.

As to whether wantonness or wilfulness, precluding defense of contributory negligence, may be predicated of the omission of a duty before the discovery of a person in peril on a railroad or street railway track, see note in 21 L. R. A. (N. S.) 427.

4. Where decedent, when struck by a street car, was at least a licensee, so that the company owed him a duty to look out for him, if, in an action for his death the company desired a charge on intestate's right to be on the track on the theory that he had gotten outside the public highway when struck, it should have requested such charge.
5. In an action for decedent's death being struck by a street car, the Court charged that, where it is a motorman's duty to keep a lookout on the track for licensees, he cannot excuse his negligence in injuring a licensee by showing that, at the time of the injury his attention was held by another duty, for, in such cases the question still remained whether at that time the motorman was exercising due diligence in keeping a lookout ahead on the track as required. *Held*, that the instruction was not erroneous as a charge on the facts, in that it prevented the jury from considering whether the motorman, because of performing his duty of watching intending passengers, was not excusable in not seeing intestate sooner.
6. The Court instructed, in an action for decedent's death from being struck by a street car, that, while a drunken person would not be run over unless he went on a track, yet the fact that one is on the track at a public crossing in an apparently helpless condition need not necessarily be contributory negligence, since, if that were the law, then no apparently helpless person, from drink or other cause, on a railway track could recover damages; that the law does not prevent one in such case from recovering, even though his condition be due to his own negligence, if the jury further believe that, notwithstanding such negligence, the motorman could have avoided the injury by exercising due diligence in keeping a reasonable outlook ahead, so as to discover him in time to avoid injuring him, but failed to do so, then, if the motorman's neglect, and not the negligence of the person injured, was the proximate cause of the injury, the company would be liable. *Held*, that the instruction was not erroneous as a charge on the facts or otherwise.

Before SPAIN, J., April, 1913. Affirmed.

Action by Ella Kirkland, as administratrix of the estate of B. D. Kirkland, deceased, against Augusta-Aiken Railway & Electric Corporation, under Lord Campbell's act, to recover damages arising from the death of her intestate, alleged to have been caused by the negligent, wilful and wanton acts of defendant. Judgment on verdict for \$5,000.00 for plaintiff. Defendant appeals.

*Messrs. Boykin Wright, George T. Jackson and J. B. Salley, for appellant, cite: Nonsuit on direction of verdict on ground that there was no evidence tending to show wilfulness or recklessness: Rule 77, Supreme Court; 75 S. C. 211; 72 S. C. 263; 75 S. C. 187; 79 S. C. 154; 65 S. C. 144. Inadvertent failure to keep lookout: 79 S. C. 210, 211; 33 Cyc. 789. Contributory negligence: 91 S. C. 333; 56 S. C. 95; 93 S. C. 58; 86 S. C. 106, 112; 2 Thompson Negligence, secs. 1787 to 1792, 1747; 51 La. Ann. 1689; 26 So. 411; 4 N. W. 605. Intoxication of decedent: 3 St. Ry. Reports 795; 33 Cyc. 840; 93 S. C. 58; 5 St. Ry. Rep. 17; 43 So. 33. Charge on facts: 93 S. C. 57; 71 S. C. 42; 61 S. C. 563; 71 S. C. 159; 90 S. C. 414, 423; 91 S. C. 201; 69 S. C. 439; 71 S. C. 62; 56 S. C. 94, 95; 61 S. C. 565; 38 Cyc. 1600. Evidence of habit or custom irrelevant: 1 Greenleaf Ev., sec. 14k; 69 S. C. 15-17; 68 Me. —; 77 Me. 62; 98 N. E. 209; 8 St. Ry. Co. 336; 133 N. Y. App. Div. 461; 27 S. C. 457; 82 S. C. 481-3. Methods on other roads: 27 S. C. 461; 60 S. C. 167-9. Cases distinguished: 68 S. C. 488; 70 S. C. 183; 86 S. C. 113; 90 S. C. 266; 90 S. C. 334, 335; 93 S. C. 329; 93 S. C. 17; 93 S. C. 49.*

*Messrs. Croft & Croft and Claude E. Sawyer, for respondent, cite: Contributory negligence no defense against liability for acts of wilfulness or wantonness: 93 S. C. 25. Inference to be drawn by the jury: 70 S. C. 183; 93 S. C. 25. Evidence of habit having connection with intentional wrongful acts: 54 S. C. 505; 65 S. C. 97. Evidence not prejudicial: 91 S. C. 516. Ruling on inadmissibility harmless: Thompson Negligence, sec. 3777. Contributory negligence, drunkenness: Beach Contributory Negligence, sec. 390. Motion for nonsuit was general upon whole case: 73 S. E. 433; 72 S. C. 260. Charge to jury: 87 S. C. 327; 86 S. C. 115; 45 S. C. 156; 38 Cyc. 1601, 1602. Not on facts: 52 S. C. 442; 80 S. C. 335; 63*



S. C. 272-288. *Duty to keep lookout*: 79 S. C. 120; 58 N. W. 1051; Thompson Negligence 1387. *As to intoxication*: 93 S. C. 56.

April 13, 1914.

The opinion of the Court states the facts and was delivered by MR. JUSTICE FRASER.

This is an action for damages for the negligent and wilful and wanton killing of plaintiff's intestate, B. D. Kirkland. The undisputed evidence shows that the deceased was under the influence of liquor in Aiken. That a policeman started to arrest him, but one of his friends promised to take charge of him and get him off on the defendant's car for his home in Madison, a village community near Graniteville, in Aiken county, in this State. That the deceased left the car at the Lutheran Crossing, one of the stops in Graniteville, and that the Lutheran Crossing was the proper place for the deceased to leave the car. The deceased alighted, as such passengers were accustomed to alight, on the opposite side of the car from his home, and started for his home by crossing the track and walking up the track on a path that was usually used by people living in that section for travel in going from one side of the Lutheran Crossing to another, and also by passengers taking the cars and leaving the cars for their homes. That the Lutheran Crossing was a flag station, but one of the regular stations, as most of defendant stations were flag stations. That the Lutheran Crossing was a public highway. That near the crossing, within a few feet, but outside of the highway, there was a ditch or "gully" that ran up near the crossties, and the path passed between the head of the "gully" and the crossties of the defendant's road. A few minutes after the car from which the deceased had alighted passed on, another car of the defendant came in the opposite direction and struck the deceased and killed him. Two boys, who were attending a

show near by, started to the Lutheran Crossing to take the car, and were going along this path, but when they got near the gully they saw an object lying across the path, one end in the short slope to the gully and the other end up in the crossties at the rail. They were afraid to go to it, but went round on the other side to the Lutheran Crossing and stopped there and waited for the headlight of the car to show what the object was, until the car was about forty feet from the deceased. It was too late then to stop the car or for the boys to help the deceased out of the way of danger. All the witnesses who testified on the subject said that a proper headlight properly adjusted would light up the track for two hundred yards with varying brightness, according to conditions. The body was dragged from the gully to and across the Lutheran Crossing, a distance of about one hundred and twenty feet.

The plaintiff alleged that the deceased was apparently in a helpless condition on the track, and was seen, or ought to have been seen, by the motorman, and that the death was due to the negligent and wilful and wanton disregard of its duty to those who were to be expected to be on the track.

The answer alleged that the deceased was a trespasser on its right of way. Denied want of care and pleaded contributory negligence, in that the deceased, while in an intoxicated condition, laid down on defendant's track, and that the deceased caused his own injury by lying down on defendant's track while in an intoxicated condition.

At the trial there was a motion for a nonsuit, which was refused; a motion for a direction of a verdict, which was also refused. There was a judgment for the plaintiff and defendant appealed upon the following exceptions:

"1. The presiding Judge erred in allowing the plaintiff to introduce in evidence over defendant's objection the financial statement showing the wealth of the defendant, for the reason that as there was no evidence whatever

tending to show wilfulness, wantonness, or recklessness on the part of the defendant on which to base a verdict for punitive damages, the admission of such evidence was incompetent, harmful and prejudicial to the rights of the defendant."

This Court cannot say that there was no evidence on which to base punitive damages.

(Appellant, in his argument, says that exceptions IV, VII, X and XI raise the same question.)

There was evidence that a proper headlight, properly adjusted, would throw light on the track for two hundred yards ahead of the car. The two boys who were coming to the station without any light, saw the deceased;

1 went around him and watched him from the crossing, waiting for the light to fall upon him. Joe Taylor, defendant's witness, said: "We were looking at the object all the time. When the headlight fell on his body, I looked to see how close the car was, and it was in thirty-five or forty or fifty feet of him." There was no witness who testified that the car could have been stopped in fifty feet. There was testimony, therefore, to show that the appellant was running its car that night with a light that afforded the motorman no possibility of stopping in time to avoid any sort of danger to people it might have been expected to find in danger on the track, or to its passengers on its cars. Was that a wilful and wanton disregard of all duty? That was a question for the jury. The appellant assumed all the way through the case that the deceased chose the railroad track for his bed and deliberately composed himself there for his drunken sleep. There is slight, if any, evidence of it. The deceased was sober enough to know of the approach to his station; walk down the car while it was still in motion; get off the car and start for home. Within a hundred feet of the place of alighting he is found with his feet in the declivity of a gully and his shoulders up in the cross-ties and his head at the iron rail.

REP.]

November Term, 1918.

The physical surroundings do not conclusively show that he deliberately made that place his bed.

This exception is overruled.

Exception II:

"The presiding Judge erred in allowing the plaintiff to elicit testimony from the witness, Gary Seigler, over the defendant's objection, that it was the custom or habit of motormen running cars on defendant's road to eat  
2 their meals on the car while so doing. The error being, as then and there urged, that there was no such act of negligence alleged in the complaint, and the investigation being as to the alleged negligent operation of the particular car which ran over the deceased, any testimony as to acts, conduct, habit or custom of motormen operating other cars of defendant was irrelevant and incompetent, and the admission of said testimony was harmful and prejudicial to the rights of the defendant."

This exception cannot be sustained. The evidence did not tend to prove negligence on this particular occasion, but was admitted by the trial Judge under the allegation of "wilful and wanton acts," and this ruling is fully sustained in principle by *Mason v. Railway Co.*, 58 S. C. 74, 13 S. E. 440, 53 L. R. A. 913, 79 Am. St. Rep. 826, and *Mack v. R. R. Co.*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913.

Exception III:

"The presiding Judge erred in not allowing the defendant to prove by the witness, Cary Seigler, that the air brake method of stopping a car at the time of this accident was the best and most approved method, and that it was the universal method in use over the country, at the time, and in confining the defendant to showing what method the defendant used—for the reason that such testimony was competent to go to the jury along with the other evidence as bearing on the question whether defendant's motorman was negligent in using the air brake method in stopping the

car which ran over deceased, and the exclusion of said testimony was harmful to the rights of the defendant."

This exception is not well taken. Gary Seigler testified as follows:

"Q. Which was the best and most approved method of stopping a car, the air brake or emergency? A. The air brake. Q. Do you know whether that was the universal method over the country at that time? A. Yes, sir."

The record does not show that this was stricken out.

Exception IV has already been disposed of.

Exception V:

"The presiding Judge erred in charging the plaintiff's fourth request, which was as follows, the italics being ours:

'That in all cases where a licensee has been run over and injured anywhere along the track, while *in an apparently helpless condition*, it is not enough *in an action alleging negligence to excuse the railroad company from damages*, for it is to show that the motorman in charge of the car *could not stop in time to prevent the injury after he had seen the person on the track*, but in such cases the question of liability depends on the fact whether the motorman, by the exercise of reasonable care in *keeping a lookout ahead*, could have seen the person on the track in time to stop and prevent the injury, and if he *negligently failed to exercise due care*, in consequence of which the licensee was injured as the proximate cause, the defendant company would be liable in damages.'

"The error in said charge being:

"(a) It entirely ignored the defendant's defense that the presence of deceased on the track in an 'apparently helpless condition' was due to his own negligence, and that this contributed as a proximate cause to his death, which would have been a complete defense 'in an action alleging negligence.'

"(b) It eliminated from the consideration of the jury the cause of the helpless condition on the track of deceased,

and, in effect, specifically directed the jury that if a particular act of omission—the failure to keep a lookout—was the main or proximate cause of the injury, without which it would not have happened, the plaintiff could recover, although it should be found that the deceased's being on the track in a helpless drunken condition was negligence on his part and contributed as a proximate cause to the injury as contended by defendant.

“(c) Because, even if the defendant was negligent in not keeping a proper lookout and in ‘negligently failing to exercise due care,’ the plaintiff could not recover if her intestate's being on the railroad track in a drunk and helpless condition was a proximate cause of his injury, and was due to his own negligence. The error of ignoring this defense and in effect charging to the contrary was manifestly highly prejudicial.”

This exception cannot be sustained. Plaintiff's fifth request to charge was as follows:

“5. That while it is true, a person guilty of contributory negligence in the slightest degree cannot recover damages for his injuries, yet the law does not require that the person injured shall be free from all negligence, for even if he were guilty of negligence, yet if you further find that the defendant was also guilty of negligence and the defendant's negligence and not that of the deceased formed the direct or proximate cause of the injury, then the defendant company would be liable in damages.

“That means this, that the defendant's negligence must be the direct and proximate cause of the injury.”

Defendant's fourth request to charge was as follows:

“4. ‘The jury is further charged that if you find that plaintiff's intestate came to his death through his own negligence, then the plaintiff cannot recover.’

“I charge you that. If Mr. Kirkland's own negligence was the direct and proximate cause of his death, the plain-

tiff cannot recover. Nor can he recover if he was guilty of contributory negligence."

Defendant's fifth request to charge was as follows:

"The jury is further charged that even though you find that the defendant was negligent in running over plaintiff's intestate, yet if you likewise find that plaintiff's intestate was also negligent, and his negligence combining

3 and concurring with the negligence of the defendant contributed to his injury to any extent as a proximate cause thereof, and without which it would not have happened, the plaintiff cannot recover, unless you further find that the defendant acted in a wilful, wanton, or reckless manner in running over him.

"I charge you that."

Defendant's seventh request to charge was as follows:

"7. The jury is further charged that while it is the general duty of those in charge of a car to exercise ordinary care to avoid injuring persons on the railroad track at places where they may be expected to be found, yet it is just as much the duty of such persons to exercise proper care and reasonable prudence to avoid being injured. So, that even though you should find that the defendant was negligent in the operation of its car in any particular, yet if you also find that the plaintiff's intestate went upon defendant's track and lay down thereon in a drunken stupor, or went to sleep thereon, and that such acts on his part amounted to negligence (the facts being entirely for you to determine), and such negligence, combining and concurring with the negligence of the defendant, contributed to his injury to any extent, as a proximate cause thereof, without which it would not have happened, then the plaintiff cannot recover.

"Both must exercise care. I charge you that."

These requests which were charged, gave the appellant the full benefit of contributory negligence, even in the slightest degree, if it were a proximate cause.

It is true the deceased had crossed the line of the public highway, and it may be his *right* was gone, but there was no evidence that he was a trespasser. The undisputed testimony was that the path in which the deceased was lying had been used by the public before the railroad was built and continuously ever since, and was one of the approaches to the station.

The deceased was unquestionably at least a licensee and the defendant owed him a duty to look out for him. If the defendant desired to have his Honor charge the  
4 difference between the right and the duty, it ought to have been requested. It is as much as a trial Judge can be expected to do to rule correctly on questions raised.

Exception VII has already been disposed of.

Exception VIII:

"The presiding Judge erred in charging plaintiff's eighth request, that where it is the duty of a motorman to keep a lookout on the track for licensees, he cannot excuse his negligence in injuring the licensee by showing that at  
5 the time of the injury his attention was on another duty required of him. The error being that said charge is not a sound proposition of law, was a charge on the facts, and prohibited the jury from considering whether the motorman, in watching the intended passengers at the station, as was his duty to do, was not guilty of negligence in not seeing intestate sooner, and thereby deprived the defendant of an important right, to its great injury and damage."

This is only a part of the eighth request to charge. The latter part of the charge is "for in all such cases the question still remains whether at the time of the injury the motorman was exercising due diligence in keeping a look-out ahead on the track, as required of him by law."

This exception cannot be sustained.



## Exception IX :

"The presiding Judge erred in charging the plaintiff's ninth request, which was as follows :

'9. That it is true, a drunken person would not be run over by a car unless he were on the track, yet, the fact alone that a person is on a railway track at a public crossing, in an apparently helpless condition, need not necessarily be contributory negligence, nor will it necessarily defeat him from recovering damages for his injuries, for if that were the law then no apparently helpless person from drink or other cause on a railway track, could recover damages; in such cases the law does not bar the person from damages, even though his presence on the track in an apparently helpless condition be due to negligence on his part, for if the jury further believes from the evidence that notwithstanding such person's negligence, the defendant motorman could have avoided the injury by exercising due diligence in performing his duties, and in keeping a reasonable lookout ahead so as to discover him in time to avoid injuring him, but failed to do so, then if such failure of the motorman to do his duty, and not the negligence of the person injured, formed the main and proximate cause of the injury, without which it could not have happened, the railroad company would be liable in damages.'

"The error being :

"(a) That said request was a charge on the facts in that it instructed the jury that certain facts would not necessarily constitute contributory negligence, when this was a question of fact entirely for the jury.-

"(b) The said request instructed the jury that even if plaintiff's presence on the track in a drunken, helpless condition was due to his own negligence, they should still find a verdict for the plaintiff if the defendant's negligence formed the main and proximate cause of the injury. Such

charge completely destroyed the defendant's defense of contributory negligence and was harmful error.

"(c) The said request, as a whole in effect, expressed the opinion of the trial Judge to the jury, that the plaintiffs should recover, contrary to the provisions of the Constitution, which inhibits him from intimating an opinion on the facts.

"(d) The request partook of the form of an argument and advocacy in behalf of plaintiff and placed the Court in giving said instruction in the unwitting attitude of an advocate of plaintiff's side of the case, to the manifest prejudice of defendant.

"(e) It was error because the jury was in effect instructed that if defendant's motorman failed to 'keep a reasonable lookout ahead,' and such negligence, and not the negligence of plaintiff, 'formed the main and proximate cause' of the injury, the company would be liable; notwithstanding the jury might also have believed that plaintiff's conduct in voluntarily becoming drunk and lying down asleep on the track was negligence and contributed in some slight degree as a proximate cause (though not as the 'main and proximate cause') to the injury.

"(f) It was also error because that portion of the charge in which it is stated that 'the fact alone that a person is on a railroad track at a public crossing,' etc., implies that the deceased was run over on a 'public crossing,' when there was no evidence to justify this charge, and is also an expression of opinion on the facts."

The difference in these requests and that in the *Craig v. R. R.*, 93 S. C. 49, 76 S. E. 21, is that in the *Craig* case the right to recover was made to depend solely on the negligence of the motorman; here the right of recovery depended on the negligence of the motorman and the absence of negligence as a proximate cause on the part of the deceased.

Exception X and XI have been disposed of above.

The judgment of this Court is, that the judgment appealed from is affirmed.

MR. JUSTICE HYDRICK dissents.

MR. JUSTICE GAGE was not on Supreme Bench when this case was heard.

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8787

FARMERS BANK OF McCORMICK v. TALBERT.

(81 S. E. 305.)

JUDGMENT. MOTION TO VACATE. FRAUD.

1. Denial of motion to set aside a default judgment under Code Civ. Proc., sec. 225, on the ground of mistake or excusable neglect, will not be disturbed, where defendant's claims that the default was due to his bad health and deficient memory, and that he had a good defense against charges made, are not sustained.
2. Where defendant gave checks on a bank for cotton purchased, which he met by depositing a draft drawn against the cotton, though he had already drawn against the cotton, with bill of lading attached, the whole transaction showed fraud, though he claimed to have overlooked the fact that he had already drawn against it.
3. It is not a defense to an action for fraud and deceit against a trained man of business for obtaining a credit of \$500.00 on draft attached to a bill of lading for cotton worth less than \$300.00, that he thought it was worth \$500.00.

Before SHIPP, J., Abbeville, April, 1913. Affirmed.

Action by the Farmers Bank of McCormick against John L. Talbert. Judgment by default. Motion to vacate judgment and for leave to answer refused. Defendant appeals.

*Mr. Wm. P. Greene*, for appellant.

*Mr. Wm. N. Graydon*, for respondent, cites: 15 S. C. 614; 51 S. C. 405; 17 S. C. 451; 56 S. C. 28; 77 S. C. 226.

REP.]

November Term, 1918.

April 14, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

The appeal involves practically only one issue, though there are seven exceptions.

The plaintiff got by default a judgment against the defendant for two thousand one hundred twenty and 40-100 (\$2,120.40) dollars.

Within thirty days thereafter the defendant moved, under section 225 of the Code of Procedure, to set the judgment aside and for leave to answer.

The motion was refused, and the defendant appeals.

It is plain the Court below did not abuse its discre-

1 tion to refuse the motion, and that is sufficient to now sustain the order which was made.

But the testimony is abundant that the Court was right to refuse the motion.

The defendant admits to a service of the summons and complaint; and he alleges an intention to answer; from which he was diverted by deficient memory, consequent upon bad health.

The clear preponderance of the testimony is against the defendant upon the issue of bad health and memory.

The defendant tendered only one witness outside of his family; the plaintiff tendered eight.

And upon the issue of fraud charged in the second and third causes of action, about which the defendant desired to be heard, the proof to sustain fraud was strong. The

defendant's affidavit consisted chiefly of a denial; it

2 offered no satisfactory explanation of his transactions with Salinas at Augusta and Frost at Charleston. About the first transaction the defendant testifies, that he bought seven bales of cotton at Plum Branch and drew on Salinas with bill of lading attached, and got credit with the plaintiff therefor; but that on the *same day* he also drew on Salinas another draft which covered other pur-

chases of that day, that he *overlooked* the fact that he had drawn for the seven bales already, and that he therefore included the seven bales in the second draft only by his *mistake*.

And the defendant seeks further to save himself from this badge of fraud by saying that he drew on the plaintiff checks in favor of the vendors of these seven bales of cotton, which checks the plaintiff refused to pay.

But, had the bank paid these checks, having also given the defendant credit for the same cotton, it would have paid twice for the same seven bales.

The issuance of the checks to pay for the cotton at first hand, and the subsequent realization of a credit on the same cotton with the bank by draft on Salinas, the two together, clearly proves that Talbert was kiting. The whole transaction is susceptible of but one conclusion, and that is Talbert *intended* to get something for nothing.

About the second transaction, that with Frost, at Charleston; the defendant does not deny that he  
3    secured credit with the plaintiff for \$500.00, upon a bill of lading attached to his draft upon Frost.

But it turned out that Frost would not pay the draft, because the cotton against which it was drawn was worth only two hundred eighty-five and 72-100 (\$285.72) dollars.

The defendant now makes the thinly veiled plea that he thought the cotton against which he drew was worth five hundred (\$500.00) dollars, when in fact it was worth little more than half that amount.

A trained man of business may not with impunity do an act which he ought to have known was wrong and which was wrong, and then say he did not know.

The order below was right and must be affirmed.

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FOOTNOTE—On the question whether statements made without knowledge of falsity constitute ground of action for fraud, see note in 18 L. R. A. (N. S.) 879.

8788, 8789, 8790

JOHN G. RICHARDS *ET AL.*, RAILROAD COMMISSIONERS, *v.*  
SOUTHERN RY. CO. *ET AL.*SAME *v.* SAME.SAME PLAINTIFFS *v.* SEABOARD AIR LINE RAILWAY.

(81 S. E. 314, 315.)

## RAILROADS. MUNICIPAL CORPORATIONS. STREET CROSSINGS.

1. The State Railroad Commission has only those powers given to it by statute, and hence in the absence of statute, could not require a city to submit plans for safeguarding a dangerous railroad crossing.
2. Act February 16, 1912 (27 Stat. at Large, p. 791), authorizing the Railroad Commission to regulate the manner in which a street may cross a railroad track, is not retroactive, and does not apply to a crossing made before its enactment.
3. Where an order of the Railroad Commission, compelling a railroad company and a city to safeguard a street crossing was directed to both defendants, and contemplated that they should share the cost of the improvement, dismissal of a petition for mandamus to enforce the order as to the city requires its dismissal as to the railroad company, as the commission might not have required the company to make the improvement at its sole expense.
4. The kind of crossing and safeguards which may be required under act of February 16, 1912 (27 St. at Large, 791), authorizing the Railroad Commission to regulate the manner in which a street may cross a railroad track, is in the discretion of the commission.

In the original jurisdiction:

Petitions for *mandamus* by John G. Richards and others, Railroad Commissioners, in three cases. No 8788, against the Southern Railway Company and the City of Columbia, to require them to submit plans to improve and safeguard the crossing of Elmwood avenue, over the Southern Railway, in the city of Columbia. No. 8789, to require the Southern Railway Company, Columbia Railway, Gas & Electric Company, and the city of Columbia, to require them to improve and safeguard the crossing of Taylor street and the tracks of the Columbia Railway, Gas & Electric Company on Taylor street, over the tracks of the Southern Railway Company. No. 8790, to require the

Seaboard Air Line Railway, the Columbia Railway, Gas & Electric Company and the city of Columbia to improve and safeguard the crossing of Elmwood avenue, and of the track of the Columbia Railway, Gas & Electric Company on Elmwood avenue, over the track of the Seaboard Air Line Railway.

Heard on return to order in each case requiring the defendants to show cause why the prayer of petition should not be granted. November 25, 1913.

*Mr. Attorney General Peebles*, for petitioners.

*Messrs. B. L. Abney and E. M. Thomson and Mr. H. N. Edmunds*, for the respondents.

April 14, 1914.

The opinion in the first case, No. 8788, was delivered by MR. JUSTICE HYDRICK.

After notice and a hearing, the railroad commission found that the crossing of Elmwood avenue, in the city of Columbia, by the Southern Railway was dangerous, and ordered the respondents to submit to it plans for improving and safeguarding it. The respondents failed to obey the order, and the commission brought this action for mandamus. The city demurred to the petition for insufficiency, on the ground, among others, that the order of the commission was without authority of law, in so far as it required the city to do any part of the work or bear any part of the cost thereof.

The commission has no power, except such as the legislature has conferred upon it. No statute has been cited and none has been found which authorizes the commission

to make the order in question, in so far as it affects 1, 2 the city. The act of 1912 (27 Stat., 791) does empower the commission to regulate and control the manner in which any street may cross any railroad track.

But well settled principles require the act to be given a prospective and not a retroactive effect. It cannot, therefore, be held to apply to a crossing made before its passage, as this was.

This conclusion renders unnecessary the consideration of the other grounds raised by the respondents. As the order was directed to both respondents, and made  
3 in contemplation that both would share the cost of the improvements, dismissal of the petition as to the city requires dismissal of it as to the railroad company, because the commission may not have required the railway company to make the same improvements at its sole  
4 expense. The kind of crossings and safeguards to be required is in the discretion of the commission.

In each of the other cases, No. 8789 and 8790, the petitions were dismissed, for the reasons stated in the above opinion, by an order *per curiam*.

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8791

DUNLAP ET AL. v. ROBINSON ET AL.

ADVERSE POSSESSION. DOCUMENTARY EVIDENCE. NEW TRIAL.

1. The testimony tending to show defendants claimed title from a common source with, but adversely to, plaintiffs, the issue as to adverse possession was properly submitted to the jury.
2. Whether failure to construe a written document was error does not arise where the construction would be irrelevant to issue on trial, and not affect the verdict.
3. Where a judgment was reversed on former appeal because of Court's omission to submit an issue of adverse possession to the jury, which issue was submitted on retrial, it was not error to refuse to grant a new trial because the Court differed from the jury in its view of the evidence.

Before GARY, ERNEST, J., February, 1912. Affirmed.



Action by Joseph J. Dunlap and others against Mittie R. Robinson and others for recovery of possession of real estate. From judgment on verdict for defendants, the plaintiffs appeal.

The plaintiffs' exceptions were as follows:

1. That his Honor erred in charging the jury as follows: "The defendant, Mittie Rebecca, says it is mine, because I have two wills of the daughters of R. D. Dunlap. My mother and my aunt were his daughters, and they willed it to me. These plaintiffs say he deeded it to my father. Now, there is the common source, you see, both claiming from R. D. Dunlap; a set of grandchildren each claiming the title of their grandfather. The plaintiffs say, 'he deeded it to our father.' The defendant says, the granddaughter says, 'my aunts held it by adverse possession, and they willed it to me and they acquired title. It was theirs by adverse possession and they willed it to me.' The plaintiffs say, 'he deeded it to our father, and having died we inherited it from him under the statute of distribution as his heirs at law.' Now, who has the better title? The defendants claim through adverse possession. The plaintiffs claim as the heirs at law under the deed." Because (a) said charge was inconsistent and confusing in the minds of the jury, the two distinct claims of title of common source and adverse possession, and, therefore, was misleading. (b) After charging the jury both plaintiffs and defendant claimed title from a common source and their claims being based on documentary evidence, which it was the duty of the Court to construe, he should have charged them that under said documentary evidence the defendant could not claim by adverse possession.

2. That his Honor erred in submitting to the jury the issue of adverse possession when there was no competent legal evidence adduced tending to show adverse holding of the defendant; or those through whom she claimed, but to

the contrary, the evidence of the defendant denied any adverse holding, and rested her claim solely upon documentary evidence, that is, two wills introduced in evidence.

3. That his Honor erred in charging the jury as follows: "I am talking now about holding it adversely for ten years. Now, there is another theory of this case that might give currency to the idea of adverse possession, and that is expressed in a letter of W. S. Dunlap himself, and that was written August 5, 1883, in Birmingham. Now, I won't read the whole letter to you. I only read that part of it, which, as I say, may give currency to what we know as a parol partition: 'I will get the girls to let you have your new purchase alongside yours there, if you will buy Jemima's children's interest, the line will be about where we established it when we had a sort of division.'" Because (a) said charge was upon the facts, and, therefore, in violation of the Constitution prohibiting Judges to charge upon facts. (b) It was submitting questions of adverse possession to the jury in direct conflict to the position taken by the defendants in their evidence as claiming under the wills introduced, which wills recited that said interest (claimed to be conveyed thereby, of Mrs. Simpson, and Miss Sarah Dunlap, to Mittie Rebecca Robinson) was an undivided one-sixth interest, heired from their father, R. D. Dunlap, hence said charge was confusing and misleading to the jury of the real issues involved.

4. That his Honor erred in failing and refusing to construe the two wills introduced in evidence and testified to as the only bases of the claim of defendant to the lands in dispute, and in leaving it to the jury to decide, whether or not the interest claimed by Mrs. Simpson, the mother of Mrs. Robinson, and her aunt, Miss Dunlap, was a divided or undivided interest, when said documents distinctly said, said claims were an undivided interest.

5. That his honor erred in refusing plaintiffs' motion for a new trial, made upon the minutes of the Court, upon

the grounds that the verdict of the jury was against the preponderance of the evidence; when the evidence established that both plaintiffs and defendant claimed from a common source, their grandfather, R. D. Dunlap, and that plaintiffs had shown better title from the common source than defendant.

6. That his Honor erred in refusing plaintiffs' motion for a new trial after holding, "That if I were trying this case without the aid of a jury, I would decide just the opposite to the verdict."

7. That his Honor erred in refusing plaintiffs' motion for a new trial after deciding that the plaintiffs had made out a legal title to the premises in question, and there being no legal evidence of adverse possession sufficient to overcome this legal title in plaintiffs, a new trial should have been ordered.

8. That his Honor erred in refusing plaintiffs' motion for a new trial upon the ground that "the Supreme Court having reversed the finding of the Court upon the former trial of this case upon substantially the same facts as proved upon this trial of the case." Because (a) there is at least one very material difference in the facts proved in this case and that of the former trial, in that the sole defendant testifying to any claim whatsoever upon this trial, Mrs. Robinson, confined her claim to whatsoever rights she had, if any, under the terms of the wills of her mother, Mrs. Simpson, and her aunt, Miss Sarah Dunlap, while upon the former trial, said defendant based her claim not only upon said will of her mother, but also upon the claim of adverse possession of her mother and her aunts and herself. (b) His Honor having arrived at a different conclusion from that reached by the jury, and there being no legal evidence to sustain the verdict of the jury, same should have been set aside and new trial granted.

9. That his Honor erred in submitting to the jury as a basis of adverse possession whether or not there had been a

parol partition of said land, during the life of W. S. Dunlap, pursuant to the terms of several letters of W. S. Dunlap, when there was no evidence other than said letters tending to establish a parol partition, in that there was no evidence that said land was definitely laid off by stakes or boundaries, or measurements or plats, or of any means that was agreed upon by them, and that the parties through whom defendant claimed had occupied certain portions so allotted or assigned, claiming it solely as their own, which would be necessary to start a claim based on adverse possession by reason of parol partition of lands held as tenants in common."

*Messrs. DePass & DePass*, for the appellants, cite: *Instructions as to adverse possession inconsistent with statement that parties claimed from common source*: 39 Col. 577; 11 Col. 161; 1 Col. 345; 11 Penn. 323; 35 Mo. App. 76; 23 Mo. App. 590. *Construction of documentary evidence*: 22 S. C. 288. *Adverse possession*: 2 Rich. L. 627.

*Messrs. Ragsdale & Dixon*, for respondents. *Mr. Ragsdale* cites: *Whether parties claimed title from common source was matter for jury*: 92 S. C. 185; 48 S. C. 243; 53 S. C. 24; 50 S. C. 161. *Adverse possession*: 3 Strob. 498; 64 S. C. 489; 2 Bail. 331; 2 McC. 289; 2 McC. 260; 1 McC. 206; 6 Rich. 62; 8 Rich. 42. *Question for jury*: 95 S. C. 121. *Disavowal of tenancy in common*: 48 S. C. 28. *Husband's possession referred to wife's title*: 1 A. & E. Enc. L. 820; 91 S. C. 348.

April 25, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This is the second appeal herein—the first being reported in 87 S. C. 577, 70 S. E. 313, where a general statement of the facts will be found.

The second trial resulted in a verdict in favor of the defendants, and the plaintiffs appealed upon exceptions which will be reported.

Upon hearing the motion for a new trial, his Honor, the presiding Judge, made the following order :

"The issues of fact in this case were submitted to a jury on the 27th day of February, 1912. After deliberating for several hours, the jury returned a verdict for the defendants for the land in dispute.

"This is a motion for a new trial upon the minutes of the Court. After hearing Mr. DePass, for the motion, I made an oral statement expressing my views, refusing the same, in substance as follows :

" 'Without hesitation, my conclusion is, that if I were trying this case without the aid of a jury, I would decide just the opposite to the verdict. My conclusion being, that the plaintiffs have made out a legal title to the premises in question, on substantially the same state of facts as at the former trial. That the same legal points urged before me were passed upon at the former trial, and the former rulings were reversed by the Supreme Court of the State, who ordered a new trial, because certain issues of fact on the question of adverse possession, were not submitted to the jury. These issues of fact were upon this trial submitted to the jury, who, as above stated, decided them in favor of the defendant. I decline to disturb the finding of the jury for the reason that if such issues were of such importance as to amount to reversible error in not submitting them, I did not see my way clear in the face of the decision of the Supreme Court in setting aside such finding, although I would have arrived at a different conclusion.'

"It is, therefore, ordered, that the motion be, and is hereby, refused."

The appellant's attorneys argued exceptions numbered 1, 2, 4, 5, and 7 together, and we will adopt their classification.

Their contention in these exceptions is that his Honor, the presiding Judge, erred in submitting to the jury the question of adverse possession, as there was no legal evidence to support the same. It is only necessary to refer to the testimony to show that these exceptions cannot be sustained.

*Fourth Exception:*

When all the testimony is considered, it clearly appears that there is no reasonable ground for supposing that the ruling of the Circuit Judge affected the result. Therefore, the question whether it was erroneous does not properly arise.

*Sixth Exception:*

This exception cannot be sustained, for the reason that it is not error for a Circuit Judge to refuse a new trial because he was not disposed to put his judgment against that of the jury. *State v. Rhodes*, 44 S. C. 325, 21 S. E. 807, 22 S. E. 306.

*Eighth and Ninth Exceptions:*

What has already been said disposes of these exceptions. Judgment affirmed.

MR. JUSTICE HYDRICK concurs in the result.

MR. JUSTICE GAGE did not sit in this case.

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8792

SETTLEMAYER v. SOUTHERN RY.—CAROLINA DIVISION.

(81 S. E. 465.)

APPEAL. CASE. NUISANCE. WILFULNESS. EVIDENCE. CONTRIBUTORY NEGLIGENCE.

1. Case on appeal should not include testimony irrelevant to questions raised by exceptions.
2. A charge, that unless the jury found that a pile of shingles and coal, alleged to be a nuisance endangering travel on a public way,

was placed or permitted to remain upon defendant's premises, and under its control, it could not obtain as an element of negligence against it, *held*, not liable to construction that the defendant would be liable if such pile were upon its premises, without reference to negligence and proximate cause; as the jury was also instructed that the defendant would only be liable for damages occasioned by the pile of shingles and coal, if they were negligently placed or left at the locus, and were a proximate cause of the injury.

3. Wilfulness is a conscious realization of wrongdoing. Charge not objectionable as justifying the belief by the jury that the same evidence warranted a finding of both negligence and wilfulness.
4. Charge on a hypothetical statement of facts not error, where the jury were instructed that the law so given was not applicable unless they found the facts to exist.
5. A railroad company negligently leaving a car loaded with wild animals, in close proximity to a public highway where it would be apt to frighten animals passing upon the highway is liable for a nuisance at common law. Code of Laws, sec. 1947, does not apply unless the notice to move the car required by the statute has been given.
6. Whether a way exists, and whether or not it is public, are questions of fact for a jury under proper instructions.
7. An irrelevant charge, being harmless, cannot be the basis of an exception.
8. Testimony that other horses were frightened by the same object under like circumstances, as alleged in the testimony with reference to the horse in question, was relevant to the issue, was the object one apt to frighten ordinary horses.
9. It is competent on cross-examination of a medical expert to inquire what symptoms following a blow upon the head would, or would not, indicate a fracture of the skull.
10. *Held*, error to instruct jury that if plaintiff was negligent, but his negligence arose by reason of the defendant negligently placing him in an extremity of danger, then plaintiff's negligence, under such circumstances, would not be contributory negligence. The jury should have inquired whether there was an extremity of danger, and whether plaintiff acted thereunder as a reasonably prudent man would have acted in the same exigency.

Before MEMMINGER, J., Gaffney, March, 1913 Reversed and new trial ordered.

Second appeal in action by W. L. Settlemeyer against Southern Railway—Carolina Division. The former appeal is reported in 91 S. C. 147, 74 S. E. 137. This appeal is

by defendant from a judgment in favor of plaintiff. The charge of the trial Judge was as follows:

Now, Mr. Foreman, and gentlemen of the jury, you gentlemen have heard all of the evidence in this case, and you have had the benefit of the arguments of the lawyers covering a period of three hours this morning, and now it will be for you gentlemen as the jury to decide this case upon the facts under the rules of law which it is the duty of the Judge to state to you.

Now, you have heard it constantly stated and you understand that this case has been in a certain form before the Supreme Court of our State once already, and we have had opinion of our Supreme Court in this particular case, reported in the 91st volume of our State Reports, on June 5th, 1912, at page 147, in which report there are three separate opinions written by the learned Judges of the Supreme Court, and therefore the law of this case has been very much discussed and written about in our State Reports, and the case has been very much discussed upon the law, and is known to the bench and the bar of the State generally under that report as the jack rabbit case. So you, gentlemen of this jury, however, will be the first jury to actually pass upon the facts of the case, because when it was tried before, under the pleadings as they were then, and the evidence as it was, the Judge, Judge Aldrich, now dead, directed a verdict in favor of the railroad company—didn't leave it to the jury at all. And now the majority of the Justices of the Supreme Court have decided that he was wrong in that particular; that there were certain issues that should have been submitted to the jury for them to decide, and there have been certain amendments in the pleadings on the part of the plaintiff and the defendant which present for you the controversy as you now have it before you, entirely for you to decide the facts; and it is for me, the Judge, now to charge you the law as best I can understand it from the principles as laid down in this case



and other general principles pertaining to the controversy in question.

Now, you will observe, gentlemen, that the case which Mr. Settlemyer claims whereby he is entitled to recover damages against the railroad is based upon certain charges which he makes against them as negligence on their part. Now, the mere fact that Dr. Settlemyer was injured is not sufficient upon which he can base a recovery, even although he was injured by the railroad company. The question is whether his injuries were brought about by any act on the part of the railroad company which you would denominate a negligent act; and, furthermore, some negligent act which he himself specifies and charges in his complaint; because, while if he should prove a great number of negligent acts, yet if it wasn't one of those which he charged, he would not be able to get damages consequent upon an injury caused by that negligent act which he did not charge. So the question that you want to first understand is, what does he charge against the railroad company, and what is negligence? Now, negligence is defined in the law to be the failure to exercise due care under all the facts and circumstances of the case; it is doing something which a reasonably prudent person would not have done, or failing to do something which a reasonably prudent person would have done. The law adopts the rule of reason as applied to persons, and only requires them to do that which is reasonable, and it says that if they exercise due care that that is all the law requires of them. If they fail to exercise due care under all the facts and circumstances of the case, the law denominates that negligence.

Now, what does Dr. Settlemyer charge against this railroad? He has four different specifications. He charges that they wilfully and negligently left standing across the highway a freight car which contained or had contained wild animals, and which rendered the public highway offensive by reason of the odors emanating from said car.

Now, see, that is one of his specifications—freight car standing across a highway and giving forth odors. Then, the second one, that the defendant had wilfully and negligently placed and permitted to remain on its platform a cage or box of wild jack rabbits in a few feet of the public highway, which contributed to the odor of the premises, and making a noise from time to time by fluttering. That is another one of his specifications. Then, the third, that it had wilfully and negligently failed to dig down the bank and cut on the side of the public highway and keep the same in reasonably safe condition. Now, while I am on that point, gentlemen, I will charge you that so far as the bank or cut is concerned—charged against them as being negligence—there is no evidence in this case whatever that the bank or cut complained of was upon the right of way or under the control of the railroad company. There is no evidence here whatever that that cut, bank, was on this railroad's property; consequently nothing to show that they could have cut down the bank if they had desired to do so; so that their failure to do that, if they did so fail, cannot be considered by you as any offense against the railroad company, even if you should find that there was an unreasonable bank there that had anything to do with Dr. Settlemyer getting injured. So you might as well eliminate that from your consideration of the case as an element of negligence.

The other one is that the defendant had negligently and wilfully placed and permitted to remain piles of shingles and coal on its premises in such a way as to partially block the public highway and prevent a safe passage where plaintiff had to pass.

Now, unless you decide from the evidence upon that point that the alleged pile of shingles and coal was upon the premises or right of way of the railroad company, and therefore under their control, that could not obtain as an element of negligence as against them, even though that

contributed in any way to bring about Dr. Settlemeayer's injury; because they are only responsible for that which is upon their premises, their right of way, and not for what might have been placed upon their premises by other persons. That is a question for you; whether or not there was such stuff on their premises. If you find that it was not on their premises, of course, it could have nothing to do with the case. If you find that it was, then it would be one of the questions for you as to whether or not that was any one of the causes contributing in any way to bring about Dr. Settlemeayer's injury.

Now, that is what he charges against them, gentlemen, and he charges and claims that by reason of some one or more or all of those causes that his horse was caused to be frightened and to run away and become unmanageable and to throw him out and injure him.

He claims not only that those acts were negligent on the part of the railroad—that is, failure to exercise due care, as I stated to you—but a step further, he claims that they were wilfully, wantonly and recklessly done by the railroad company; that not only did they fail to exercise due care, but they consciously, realizing and knowing that they were doing wrong, they nevertheless went ahead and did those things or failed to do those things which he claims they should have done. So that he claims, not only that he is entitled to actual damages by reason of negligence, but he claims that he is entitled to punitive damages by reason of wilfulness, wantonness and recklessness, charged in his complaint. Now, unless his injury, gentlemen—and there is no dispute but that he was injured—was brought about as a proximate result of some one or more or all of those things charged on that point, of course, his case ceases and he is not entitled to recover any damages. And, furthermore, unless you are satisfied by the greater weight of the evidence throughout that there was negligence on the part of the railroad in any one or more or all of those things

bringing about his injury as a proximate result thereof, his case fails, because he has got to come into Court and satisfy you by the greater weight of the evidence that the railroad company has been guilty of negligence—of some one of those things charged, or all of them—in order to be entitled to a verdict.

Then, you come to the question of what the railroad company comes in and says as against those charges. The railroad comes in—known as the defendant—puts in an answer. Now, it in that answer denies all negligence on its part, claims that it was not guilty of any failure to exercise due care in any of the particulars charged, or that Dr. Settlemyer was injured as a consequence proximately of any of those things. The defendant goes on and claims, furthermore, as it has a right to do under the law, without admitting any negligence on its part, that even if you gentlemen do find that it was negligent, that Dr. Settlemyer could not recover under the law, because he himself was also negligent, and that his negligence contributed to his injury as a proximate cause thereof.

Now, you have heard that answer read, which sets out the particulars wherein they claim that he was negligent; that he undertook to drive a horse which was not of a reasonably gentle and manageable nature, when not in a fit condition to so drive it, and without taking sufficient care when the horse became alarmed to take any precaution whatever to escape the danger, if any there was; the horse becoming unmanageable; that he struck the horse and caused it to run wildly away and come in contact with the bank and throw him out and injure him, and states that he then well knew that his horse was not of such a reasonably gentle nature, but knew that it was easily excitable, and he should have taken proper steps to manage his horse—that that was the failure to exercise due care on his part; because the law requires that corresponding duty on the part of a person seeking to recover damages as it does

of the person against whom the damages are sought, to exercise due care, and if the greater weight of evidence shows that he has failed, the burden of proof being as to that upon the railroad company here that charges it, to show it by the greater weight of the evidence. If he has failed in those particulars to exercise due care—you are the judges of what that shall be under the facts and circumstances of each case—and his failure to exercise due care contributing to his injury, as a proximate cause of it in any degree, then, under our law, he is not entitled to recover any damages. The law simply says that it leaves the parties where it finds them; that the idea is that it sets a premium on carelessness for a man to get damages where he himself has been careless and negligent, and his carelessness and negligence contributing in any degree as a proximate cause of his injury. So, if that be shown, even though negligence be proved against the railroad, the plaintiff, Dr. Settlemyer, in this case would not be entitled to recover damages. The definition of contributory negligence being “the want of ordinary care of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof without which the injury would not have occurred.”

But bear in mind, gentlemen, that doctrine of contributory negligence, defeating recovery, is no defense as against wilful, wanton or reckless negligence. In other words, if you decide that there is wilful, wanton and reckless conduct on the part of the railroad company proved in this case, as it is charged here, why then, even although you decide that Dr. Settlemyer was guilty of contributory negligence, such as he is charged with in the answer, that would not defeat his recovery. You can readily see that that is sound reason. The fact that a man is negligent—suppose a man placed himself on a railroad track where he had no right to be, then a trespasser, that would not justify the engineer

on the railroad of deliberately running over him just because he was negligent in being at a wrong place. And so the law says if there was wilful, reckless and wanton conduct on the part of the railroad that does not defeat the man's recovery, even though he were guilty of contributory negligence. But it does defeat the recovery if the acts charged against the railroad company are negligent—that is, failure to exercise due care, and not wilful, wanton or reckless—a conscious failure to perform a manifest duty—or such utter recklessness as a man of reasonable mind would conclude that the railroad company acted in such disregard of law—that is wilful, reckless and wanton negligence, against which contributory negligence is no defense.

To come in detail to the particular points of this case. Under the statute law of this State a railroad company has no right to leave its cars across a public highway for a period of more than five minutes, and if it receive notice to move the car after it has been across the highway for a greater length of time than that, and it fails to do so, and injury results to some one as a proximate result of the car being thus in violation of the statute law across the highway, then the law says that is deemed to be negligence on the part of the railroad company itself; and that presumption of negligence goes throughout the whole case, and the burden is upon the railroad to show that it was not negligent. It raises a presumption of negligence or says that it is negligence of itself for it to have its car so placed, and a person who receives injury by reason of the car being so placed, as a proximate result of it, has that in his favor throughout the inquiry—that they are negligent by reason of having violated the statutory law. Now, however, that, of course, does not apply, you cannot hold it to be negligence and as a violation of the statute unless notice was given to the railroad, as you heard read from the

statute there, and which it is useless for me to read to you again.

But, however, and it is also charged in this case, not only that this railroad had its car across this alleged highway in violation of the statute, or in violation of law, but it is also charged that it was negligence on their part, regardless of the statute, to have its car there or even so near across it as to cause animals, horses, to be frightened by reason of the alleged noxious odor of the car and the smell of wild animals kept therein.

Now, under the law, gentlemen, it would be for the jury to say whether or not it was negligence on the part of the railroad company to have its car placed across, obstructing a public highway, or so near it as to endanger safety to those traveling the public highway—having a right to travel that highway.

Now, a question is made here as to whether this was a highway or not. That is for the jury to decide from the evidence. Unless you decide that it was a public highway, then this law that I have stated to you would have no application—that being only as to highways. But it would be for you gentlemen to say whether that road is such a one as the public generally had been accustomed to use for a period of more than thirty years without permission from any one—using it as a matter of right. If so, the right of the public would have become established therein, and it would be such a public highway—otherwise not.

So then, gentlemen, it is for you to say, from all the facts and circumstances, does the evidence show by the greater weight or preponderance of it that it was a want of due care on the part of the railroad company to have the car placed as it was placed.

There is some argument about the color of the car. There is no claim as to that. The charge is as to the odors of the car and its position with reference to the highway. If you decide that it was want of due care to so

REP.]

November Term, 1918.

place its car, your last question would be, did Dr. Settle-meyer's injury come about as a proximate result of that, or was it a proximate result of any of the alleged things charged against this railroad company as by which he claims he was injured, that his horse was frightened, that it ran away, threw him out and caused, as he claims, by these alleged acts on the part of the railroad company.

The jury have to take those matters and decide them for themselves in each case. They set the standard of what people must do in the exercise of due and ordinary care. The Court can only tell you what the standard is: that it is due care which is required. A person might bring a suit against a railroad company for leaving a car anywhere, and the question would be for the jury whether in the exercise of due care it was negligence for the railroad company to leave the car there. If the jury say it was negligence, then the railroad would be responsible. Otherwise it would not.

Now, those are the general principles, gentlemen, to be applied to this inquiry.

The charge is made, gentlemen, that the road was obstructed. Now, I charge you along that line that obstruction means something which reasonably materially affects the passage of the road. The law does not regard mere trifles, and if there be such a slight projection of something into a public highway as would not materially affect it—the passage of it—by persons making a reasonable use of it, notwithstanding the slight obstruction, that would not be denominated under the law what is known as an obstruction. An obstruction being, of course, for the jury to decide in each particular case; something which materially affects the passage of the road; more than a mere trifling thing not materially affecting the passage.

Now, then, gentlemen, that covers the principles generally, and you come to this question, though, arising upon the question of contributory negligence; that if you decide



that the railroad company was negligent in any of the particulars charged, or one of them—with the modifications that I have given you—that Dr. Settlemeyer was negligent in the management of his horse, but that his negligence arose by reason of being put in the extremity of danger by reason of the negligence of the railroad, you could not hold that against him as contributory negligence. That would be in the law what is known as an error in the extremity of the situation; where a person or a railroad brings you into a position of peril by reason of negligence, and you there in that extremity take a wrong course, take one that perhaps produces a disastrous result, whereas you might have selected one that does not, the law would not hold that as contributory negligence against you, because the law says having made that mistake in the extremity to which you have been reduced by reason of the negligence of the other person, that that could not be held as contributory negligence against you.

Now, on the question of damages: If you decide in favor of the plaintiff, Dr. Settlemeyer, for actual damages, then your inquiry would be confined to giving him such amount as would actually compensate him for the injuries received. You taking into consideration there, the law says, such things as pain and suffering, and such as loss of earning capacity in the past, and as to future damages if the injury be permanent. Those must be confined only to such as is reasonably certain will of necessity result in future from the injury; the idea being simply to compensate the party for the injuries received; such damages as those as I have stated to you; actual damages are those which flow from negligence—mere negligence. Now, then, if you go a step further and find, not only mere negligence, but wilfulness, recklessness and wantonness, under the rules that I have stated to you in reference to that element, then you add to the actual damages, by way of punishment, a sum known as punitive damages. The idea being there to

punish the defendant and others in like circumstances and deter them from committing such like wrongs in the future.

The amount claimed here is five thousand dollars—that is for the actual and punitive damages charged in the complaint. If you find both actual and punitive damages, add the two together in a lump sum.

Upon this defense of contributory negligence: That is what is known as an affirmative defense. The burden is upon the railroad, that charges that against the plaintiff, to prove it by the greater weight or preponderance of the evidence. If the thing is exactly evenly balanced, then it is not made out in the law. There must be something that outweighs in favor of the defense set up in order for it to be established. So as to the plaintiff's case. He must prove his case by the greater weight or preponderance of the evidence. If there the thing is evenly balanced in your mind; if you cannot make up your mind one way or the other about it, the law comes in and gives you the rule by which you solve the difficulty and says plainly that unless he satisfies you by the greater weight, the preponderance, if it fails to preponderate on his side, then his case fails and he is not entitled to recover.

You will decide the case, gentlemen, writing either—We find for the plaintiff (so much money), writing it out in words, and not in figures; or—We find for the defendant. The foreman signs the verdict, and the date—and write it on this paper marked summons for relief. I am going to hand you also, gentlemen, the answer of the defendant, setting out the defenses which I have referred to.

Now, you can take this record, gentlemen, and decide the case.

The exceptions were as follows:

1. That his Honor erred in charging as follows:

“The other one is, that the defendant had negligently and wilfully placed and permitted to remain piles of shingles

and coal on its premises in such a way as to partially block the public highway and prevent a safe passage where plaintiff had to pass.

“Now, unless you decide from the evidence upon that point that the alleged pile of shingles and coal was upon the premises or right of way of the railway company, and, therefore, under their control, they could not obtain as an element of negligence as against them, even though they contributed in any way to bring about Dr. Settlemeier’s injury; because they are only responsible for that which is upon their premises, their right of way, and not for what might have been placed upon their premises by other persons. That is a question for you—whether or not there was such stuff on their premises. If you find that it was not on their premises, of course it could have nothing to do with the case. If you find that it was, then it would be one of the questions for you as to whether or not that was any one of the causes contributing in any way to bring about Dr. Settlemeier’s injury.”

The errors being, as it is respectfully submitted:

(a) That in so charging, his Honor left it to the jury to find a verdict against the defendant simply because they might find that the pile of coal and shingles was on the premises of the defendant, without further instructing the jury that even if this coal and shingles was on the premises of the defendant, it could not be held liable, unless:

(1) They were negligently placed there, or negligently allowed to remain there, by the defendant.

(2) That such negligence was a proximate cause to his injury.

(b) Because, in so charging, his Honor left it to the jury to determine whether such coal and shingles was on the premises of the defendant company, there being no evidence tending to show that the place where this coal and shingles was was a part of the premises of the railway company.

(c) Because, in charging as he did, his Honor left it to the jury to say, even if this coal and shingles was on the premises of the defendant, it was "*any one of the causes contributing in any way to bring about Dr. Settlemeyer's injury.*" It being respectfully submitted that even if they were on the premises of the defendant, no recovery could be had, unless:

(1) They were negligently placed, or allowed to remain there by the defendant; and,

(2) They contributed as a proximate cause to his injury, and his Honor erred in not so instructing the jury.

2. Because his Honor erred in charging as follows:

"Now, then, gentlemen, that covers the principles generally, and you come to this question, though, arising upon the question of contributory negligence; that if you decide that the railroad company was negligent in any of the particulars charged, or any one of them—with the modifications that I have given to you—that Dr. Settlemeyer was negligent in the management of his horse, but that his negligence arose by reason of being put in the extremity of danger, by reason of the negligence of the railroad, you could not hold that against him as contributory negligence. That would be in the law what is known as an error in the extremity of the situation; where a person or a railroad brings you into a position of peril by reason of negligence, and you there in that extremity take a wrong course, take one that perhaps produces a disastrous result, whereas you might have selected one that does not, the law would not hold that as contributory negligence against you, because the law says having made that mistake in the extremity to which you have been reduced by reason of the negligence of the other person, that that could not be held as contributory negligence against you."

(a) In that, in so charging, his Honor, as it is respectfully submitted, violated section 26, article 5 of the Constitution and charged upon the facts and invaded the

province of the jury, and instructed them that the facts and circumstances related by him in his charge could not be held as contributory negligence on the part of Dr. Settlemeier.

(b) In that, in so charging, his Honor, as it is respectfully submitted, intimated to the jury, and stated to them "what facts, or series of facts or combination of facts," would constitute contributory negligence, thereby violating the provisions of article 5, section 26 of the Constitution.

(c) Because, in so charging, his Honor failed to instruct the jury that the rule of law governing this case was that of a person of ordinary care, sense and prudence, and by his failure to do so he left it in the power of the jury to find that Dr. Settlemeier was not guilty of contributory negligence, even though they might have found that a man of ordinary care, prudence and sense would not have acted as Dr. Settlemeier did in this particular instance. It being respectfully submitted that the standard of care to be applied in his case is that of a man of ordinary care, sense and prudence, and not what any particular person did or did not do under any particular state of facts.

3. Because it is respectfully submitted that his Honor erred in charging the jury on the question of damages, as follows:

"Now, on the question of damages: if you decide in favor of the plaintiff, Dr. Settlemeier, for actual damages, then your inquiry would be confined to giving him such an amount as would actually compensate him for the injuries received. You taking into consideration there, the laws says, such things as pain and suffering, and such as loss of earning capacity in the past, and as to future damages, if the injury be permanent. Those must be confined only to such as is reasonably certain will of necessity result in future from the injury; the idea being simply to compensate the party for the injuries received; such damages as those as I have stated to you; actual damages are those

which flow from negligence—mere negligence. Now, then, if you go a step further and find, not only mere negligence, but wilfulness, recklessness and wantonness, under the rules that I have stated to you in reference to that element, then you add to the actual damages, by way of punishment, a sum known as punitive damages. The idea being there to punish the defendant and others in like circumstances, and deter them from committing such like wrongs in the future.”

The errors being, it is respectfully submitted :

(a) That his Honor, in so charging, instructed the jury, in effect, that the same act, and the same evidence would warrant the jury in finding that the defendant was guilty of negligence and at the same time of wilfulness and wantonness; whereas, it is respectfully submitted that the same act cannot be an act of negligence and at the same time an act of wilfulness and wantonness.

(b) Because his Honor in so charging instructed the jury, in effect, that the same evidence would warrant them in finding that the defendant was negligent and at the same time wilful and wanton; whereas, it is respectfully submitted, his Honor should have instructed the jury that the same evidence would not support a charge of negligence and at the same time a charge of wilfulness and wantonness.

4. Because his Honor erred in instructing the jury as follows:

“To come in detail to the particular points of this case. Under the statute law of this State a railroad company has no right to leave its cars across a public highway for a period of more than five minutes, and if it receives notices to move the car after it has been across the highway for a greater length of time than that, and it fails to do so, and injury results to some one as a proximate result of the car being thus in violation of the statute law across the highway, then the law says that is deemed to be negligence on

the part of the railroad company itself; and that presumption of negligence goes throughout the whole case, and the burden is upon the railroad to show that it was not negligent. It raises a presumption of negligence, or says that it is negligence of itself for it to have its car so placed, and a person who receives injury by reason of the car being so placed, as a proximate result of it, has that in his favor throughout the inquiry—that they are negligent by reason of having violated the statutory law. Now, however, that, of course, does not apply, you cannot hold it to be negligence and as a violation of the statute unless notice was given to the railroad, as you heard read from the statute there, and which it is useless for me to read to you again.”

The errors being, as it is respectfully submitted:

There is no evidence in this case showing that any notice was given to the railroad company, as required by the statute, and his Honor erred in leaving it to the jury to determine whether or not notice had been given, instead of instructing them, as he ought to have done, that no notice had been given, and that, therefore, this could not be considered by them.

5. Because his Honor erred, as it is respectfully submitted, in charging as follows:

“But, however, and it is also charged in this case, not only that this railroad had its car across this alleged highway in violation of the statute, or in violation of law, but it is also charged that it was negligence on their part, regardless of the statute, to have its car there, or even so near across it as to cause animals, horses, to be frightened by reason of the alleged noxious odor of the car, and the smell of wild animals kept therein.”

“Now, under the law, gentlemen, it would be for the jury to say whether or not it was negligence on the part of the railroad company to have its car placed across, obstructing a public highway, or so near it as to endanger

REP.]

November Term, 1918.

safety to those traveling that public highway—having a right to travel that highway.”

The error being, as it is respectfully submitted, that under the law, a railroad company has a right to leave cars on its track near a highway, provided such cars do not obstruct the highway, and his Honor erred in instructing the jury that it might be negligence to leave a car near to a public highway.

6. Because his honor erred in instructing the jury as follows:

“Now, a question is made here as to whether this was a highway or not. That is for the jury to decide from the evidence. Unless you decide that it was a public highway, then this law that I have stated to you would have no application—that being only as to highways. But it would be for you, gentlemen, to say whether that road is such a one as the public generally had been accustomed to use for a period of more than thirty years without permission from anyone—using it as a matter of right. If so, the right of the public would have become established therein, and it would be such a public highway—otherwise not.”

“So, then, gentlemen, it is for you to say from all the facts and circumstances, does the evidence show by the greater weight or preponderance of it that it was a want of due care on the part of the railroad company to have the car placed as it was placed.”

The errors being, as it is respectfully submitted:

That whether this was a public highway was a matter of law and not a matter of fact to be passed upon by the jury, and his Honor should have determined this question for himself and not have left it to the jury, as he did.

7. Because his Honor erred in instructing the jury as follows:

“The jury have to take those matters and decide them for themselves in each case. They set the standard of what people must do in the exercise of due and ordinary



care. The Court can only tell you what the standard is: That it is due care which is required. A person might bring a suit against a railroad company for leaving a car anywhere, and the question would be for the jury whether in the exercise of due care it was negligence for the railroad company to leave the car there. If the jury say it was negligence, then the railroad would be responsible. Otherwise it would not."

The errors being, as it is respectfully submitted:

That his Honor, in charging as he did:

(a) Left it to the jury to set a standard of what people in the exercise of due and ordinary care would do, and in instructing the jury that "if they say it was negligence, then it would be negligence," and in further instructing them that a person could bring a suit against a railroad company for leaving its car anywhere, and it would be a question for the jury to say whether in the exercise of due care it was negligence to leave it at such place, thus placing it in the power of the jury, under the disputed question of fact in this case, to say whether it would be negligence for the railroad company to have left its car outside of the limits of a public road—if any such existed—at a point so distant from said road as not to endanger persons traveling along the highway.

8. Because his Honor erred in allowing evidence to be introduced as to the fright of other horses.

The error being, it is respectfully submitted:

(a) That what occurred with other horses at other times was irrelevant and tended to prejudice the case in the minds of the jury by permitting the plaintiff to introduce evidence as to what occurred as to other persons who are not parties to this suit.

(b) That it was allowing the witness to testify and give his opinion upon a question to be solved by the jury.

9. Because his Honor erred in permitting the plaintiff to ask the following question of Dr. George W. Heinitsh:

"Q. If, on account of a blow upon the head, some portion of the skull is bent down, slightly pressing upon the brain, in that event, what effect would every exertion or hard work have on the individual?"

And in permitting the witness to answer it against the objections of the defendant.

The error being, as it is respectfully submitted:

That there was no evidence tending to show that the skull of the plaintiff was bent down or was pressing upon the brain, and it was, therefore, an error to allow the plaintiff to ask the medical expert as to his opinion upon a supposed state of facts which did not exist, and which were not pertinent to the issues of this case.

*Messrs. Sanders & DePass*, for the appellants, cite: *Charge as to nuisance omits reference to proximate cause*: 55 S. C. 397; 51 S. C. 237; 58 S. C. 222; 94 S. C. 143. *Charge on facts*: 90 S. C. 414. *Standard of due care*: 69 S. C. 534. *Same act cannot be both negligent and wanton*: 69 S. C. 494; 68 S. C. 98; 78 S. C. 329; 81 S. C. 32; 91 S. C. 78. *Hypothetical charge not relevant*: 1 Jones Ev., sec. 371; Abb. Civ. Jury Trials 199; 17 Cyc. 247; Thomp. Trials, sec. 606.

*Mr. J. C. Otts*, for the respondent, cites: *Entire charge unobjectionable*: 54 S. C. 498; 55 S. C. 568; 57 S. C. 280; 86 S. C. 16; 85 S. C. 455. *Irrelevant instruction harmless*: 74 S. C. 135; 72 S. C. 361. *Charge on facts*: 58 S. C. 360; 47 S. C. 517; 86 S. C. 394; 6 Thomp. Neg., sec. 7019. *Further instructions should have been requested if needed*: 60 S. C. 169. *Waiver of objection to charge*: 74 S. C. 135; 72 S. C. 361. *Common law liability for frightening animals*: 91 S. C. 150. *Jury should determine existence of way*: 74 S. C. 425; 80 S. C. 376; 86 S. C. 154. *Evidence as to animals being frightened*: 27 Conn. 631; 70 Me. 282; 49 Am. Rep. 613; 76 S. C. 62; 72 S. C. 1.

April 15, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

The record is too voluminous; there are one hundred pages of testimony; little of it relevant to the issues

1 made by the exceptions; four-fifths of it might have been omitted, to the advantage of everybody, but especially to the litigants.

The plaintiff got a verdict against the defendant for twenty-five hundred (\$2,500.00) dollars, damages to the person. The defendant appeals. The cause has hitherto been here. 91 S. C. 147, 74 S. E. 137.

The delict charged against the defendant is that it left a box car, or cars, on its tracks, near or at a public highway crossing; that the cars had been occupied by certain wild animals so that they gave out foul odors; that on the platform near the car defendant suffered to remain a cage inhabited by rabbits which made fluttering noises; that while plaintiff was driving along the highway at and over the crossing, his horse became frightened by the sounds and odors, ran away, and flung the plaintiff out of the buggy to his hurt.

The answer admitted plaintiff was driving along a road and was injured; denied negligence, and pleaded contributory negligence, amongst other things, in the management of his horse.

There are nine exceptions, of which seven suggest errors in the charge, and two suggest errors in the admission of incompetent testimony.

In the supplementary argument of the appellant's counsel are these words: "We respectfully submit that there is merit in the appellant's second and ninth exceptions, no matter what may be said as to the others."

That is a helpful and candid statement to make; it informs the Court of counsel's real contentions.

REP.]

November Term, 1918.

The charge and the exceptions thereto will be printed in the report of the case.

The first exception is without merit.

The complaint sets out four delicts, and the Court was discussing the fourth, that which has reference to shingles piled near the locus.

The exception is that the Court, in effect, charged the jury that the defendant was liable for the simple act of placing or leaving the shingles at the locus, and without regard to whether the act was negligent or whether

2 it was a proximate cause of the accident. But the Court stated to the jury that "the other (issue) is that the defendant had negligently and wilfully placed and permitted," etc.; and the Court had in the inception of the charge instructed the jury that the defendant was in no event liable except for negligence, and had defined what constituted negligence; and referring to the fourth delict, the Court instructed the jury "it would be one of the questions for you, as to whether or not that was one of the causes contributory in any way to bring about Dr. Settlemeier's injury."

The jury is presumed to have understood from the charge that the defendant was only liable under the fourth delict in the event the shingles were negligently left or placed at the locus, and unless that was a proximate cause of the accident.

The third exception is without merit.

It is true negligence is the result of inadvertence and wilfulness is the result of intent; but the Court did not instruct the jury that the same act might be referred

3 to neglect or to intent; the Court had aforetime, at folio 447, plainly advised the jury what wilfulness meant, to wit: a conscious realization of wrongdoing.

The fourth exception is without merit.

The Court read to the jury section 1947 of the Code of Laws; but the jury was instructed that the section had no

application to the case unless the notice there referred  
4 to was given to the railroad company. It is con-  
tended, however, by counsel, that no such notice was  
given, and the jury ought to have been so advised by the  
Court. But if in fact no such notice was given, then the  
statute was not applicable, and the jury so understood.

The fifth exception is without merit.

It was correct to instruct the jury that independent of  
section 1947 of the Code of Laws, the defendant was liable  
if it left its cars on the tracks so near a crossing as  
5 to frighten passing animals by reason of the noxious  
odors therefrom, and if that was, in the jury's judg-  
ment, negligent.

It is not true that the defendant might leave its cars with  
impunity on its track near a highway, provided only the cars  
do not obstruct the highway.

*Obstruction* is not the *only wrong*, which might come  
from a car standing in close proximity to a public crossing.

The sixth exception is without merit.

The statement of the appellant's contention defeats itself.

Whether a way exists, and whether it be public, are

6 always questions of fact for a jury, under proper  
instructions.

The seventh exception is without merit.

By the defendant's own witnesses the car was within three  
feet of the ruts of the highway; so that if the Court did  
charge about the liability of a railroad company about a car  
"so distant from said road as not to endanger persons  
7 travelling along highways," the instruction had no  
relevancy to the case at bar, and did not operate on  
the fact in the case at bar. The defendant made no pretense  
that the car was distant from the crossing.

The eighth exception is without merit.

The issue was the liability of the obstruction to cause  
fright to the horse of the plaintiff; and that involves another  
issue, to wit: The susceptibility of that horse to fright. If

other horses were affected by the obstruction under  
8 like circumstances in the same way the plaintiff's  
horse was affected, the inference follows that the  
obstruction was calculated to scare the ordinary horse. The  
rule is thus stated in 11 Cyc., p. 284: "The observed uni-  
formity of nature raises under such circumstances (*i. e.*,  
identical physical conditions) an inference that like causes  
will produce like results," and conversely, that like results,  
under like circumstances, are probably due to the same  
cause.

And that leaves for the last consideration those two  
exceptions hereinbefore referred to, the second and ninth;  
and of these two, the ninth will be first considered, an  
improper question put to a medical man.

Dr. Heintish was a witness for the defendant, and  
9 the question objected to was put to him on cross-  
examination.

Here, if there be hurt, it must lie in the answer of the  
witness, and not in the question of counsel.

The answer was: "Where you have a fracture of the skull,  
of course you have inflammatory symptoms set up, and men-  
ingitis, inflammatory symptoms, and in that case epilepsy  
might follow; and if there be pressure, these conditions  
might come on any time during the life of the injured per-  
son; and (redirect) if there be an indentation, the signs or  
symptoms grow worse; and if there be improvement in the  
patient's condition, then there was likely no fracture.

It is manifest from the testimony of the doctor, that the  
issue whether or not there was a fracture, was not settled by  
the surgeon's knife, but by signs or symptoms from which a  
fracture might be inferred or negatived. It was competent  
on cross-examination to argue a fracture from symptoms;  
or to negative a fracture from symptoms, as defendant's  
counsel undertook to do.

Finally, that exception upon which counsel for appellant expended most of his argument is the second. It  
10 imputes to the charge an error of commission, stated in two aspects; and also an error of omission.

But the body of the offense given lies in taking from the jury the decision of whether the plaintiff was guilty of a negligence which proximately contributed as one of the causes of the accident.

In short, it is contended the jury was instructed that the plaintiff's conduct was not negligent.

And for authority, reference is craved to a charge on the same subject, by the same trial Judge, already disapproved. *Dobson v. Receivers*, 90 S. C. 415, 73 S. E. 875.

The particular passage in the charge so assailed, lies betwixt folios 466 and 468, and embraces about twenty lines, starts with "Now, then, gentlemen," and concludes with "as contributory negligence against you."

Theretofores the Court had given to the jury a plain and full charge of what negligence consisted, and of the effect of negligence on the part of a plaintiff.

At the point now under consideration, the Court proceeded to state a limitation on the doctrine of the effect of plaintiff's negligence theretofore set forth. The limitation was characterized an "error in the extremity of the situation."

That is to say, if in a noncomplex case a plaintiff acts with negligence, and that act is one of proximate causes of the accident, then he cannot recover.

But, if that act by plaintiff be induced by a perilous situation thrust upon him by defendant, which makes it apparently necessary for the plaintiff to act *now*, then such act is modified by the extremity, and the jury *may characterize it*, not as negligence, but as excusable apparent necessity, and harmless to defeat plaintiff's action.

The charge on that subject in the case at bar is not different in principle from the charge above referred to.

REP.]

November Term, 1918.

The Court instructed the jury here: "If you decide that the railroad company was negligent, (and) that Dr. Settlement was negligent, but that his negligence arose by reason of being put in the extremity of danger by reason of the negligence of the railroad (then) you could not hold that against him as contributory negligence \* \* \*."

Where a \* \* \* railroad brings you in a position of peril by reason of its negligence, and you \* \* \* in that extremity take a wrong course \* \* \* the law would not hold that as negligence against you, *unless you failed to act with reasonable care under the extraordinary circumstances* of the particular transaction.

Some immaterial words of the charge have been omitted; a few in brackets have been added, to lend clearness, and the last words in italics are those which ought to have been added by the Court, so that the jury might say at last, whether the plaintiff did that which he ought to have done, extremity or no extremity. In every transaction, the jury must judge (1) if there be an extremity, and (2) whether the plaintiff acted *thereunder* as he ought to have acted. The true rule is stated in *Thompson v. R. R.*, 81 S. C. 338, 62 S. E. 396: "The test is whether a reasonably prudent man, in the same exigency would have (so acted)."

Finally, while the books do state a rule like that laid down by the Court, the rule of the extremity of the situation, yet the rule is not relevant to every transaction. The rule is stated in 21 Cyc. 521; and it is not relevant to the facts of this case, unless to the facts of every tort case.

It was strictly relevant in the Thompson case, *supra*; and though the opinion therein did not give a name to the rule, the rule in its essence was applied.

The jury in the case at bar was practically instructed, that this was a case for the application of the rule; and that under the rule, that which the plaintiff did towards the man-



agement of his horse could not under the extremity of the circumstances be counted against him.

Judgment is set aside, and a new trial is ordered.

MR. CHIEF JUSTICE GARY concurs in the result.

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8793

ANNIE TURNER v. F. W. POE MFG. CO.

(81 S. E. 480.)

APPEAL. MASTER AND SERVANT. EVIDENCE.

1. Testimony irrelevant to question on appeal should be excluded from case.
2. An untoward event which works injury to the operator of a machine in a factory does not of itself raise a presumption that the machine was defective, but there must be other direct or circumstantial evidence that the machine caused the injury because of a defect in its parts, and that such defect was the result of the master's negligence.
3. Plaintiff's loom having stopped, she took hold of the wheel to adjust the harness, when the loom started involuntarily, and some part of it jerked plaintiff and caused her injury. The only other evidence to show defect in the loom was that the loom fixer had been called to that loom the afternoon before, and that all the looms in the mill after eight years' use and in the year succeeding the accident were discarded. *Held*, that such proof was insufficient to show that plaintiff's accident resulted from a defect in the loom or from defendant's negligence.

Before SHIPP, J., Greenville, April, 1913. Reversed.

Action by Annie Turner against F. W. Poe Mfg. Co., for personal injuries received while in defendant's employment. From judgment on a verdict for plaintiff, defendant appeals.

*Messrs. Haynsworth & Haynsworth*, for appellant, cite: *No proof of master's negligence*: 20 A. & E. Enc. (2d ed.) 77, 142-143; 72 S. C. 402; 39 S. C. 39. *Servant was aware of danger*: 55 S. C. 483; 72 S. C. 237. *Plaintiff assumed*

REP.]

November Term, 1918.

risk: 79 S. C. 502; 70 S. C. 242; 84 S. C. 283; 89 S. C. 502; 86 S. C. 69; Labatt Master and Servant, sec. 1249.

*Mr. Robert Martin*, for respondent, cites: *Sufficiency of testimony for jury*: 50 S. C. 556. *Servant not charged with duty to discover defects*: 86 S. C. 441; 26 Cyc. 1090. *Inspection master's duty*: 86 S. C. 411; 72 S. C. 412; 71 S. C. 81; 40 S. C. 109; 66 S. C. 485, 486; 52 S. C. 443; 38 S. C. 208; 37 S. C. 604; 35 S. C. 407; 34 S. C. 215; 18 S. C. 281, 282, 262; 15 S. C. 443. *Servant not required to inspect*: 38 S. C. 206. *Attempt to repair, cast burden on master to show care*: 95 S. C. 244; 18 S. C. 275; 34 S. C. 211; 13 S. E. 419; 35 S. C. 405; 14 S. E. 808; 15 S. C. 454; 86 S. C. 435.

April 15, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

The record is too voluminous; there are 108 pages of printed testimony; one-half of it is not relevant to the

1 issues made by the appeal. This is a great hardship on litigants, and ought not to be imposed upon them.

The plaintiff, forty years old, once a widow and now again married, had a verdict below, and the defendant appeals.

She sued two years after the event. She was a spare weaver, and had only begun to operate that loom the afternoon before the day of the accident, though she had operated many looms at other mills, and had worked in mills all her life.

This mill was built in 1900, the looms were then installed, the accident occurred in February, 1910.

The cause of the injury was the "slamming" and then the starting up of a loom; and the character of the injury was said to be to the plaintiff's back and side, "due to muscular separation of one rib from another" \* \* \* "an injury that

will grow back and permanently readjust itself in the course of time." (Dr. Walker, for plaintiff.)

There are three exceptions, but they all relate to the refusal of the Court to grant a nonsuit, or to direct a verdict for the defendant: (1) for lack of proof by the plaintiff; (2) for the plaintiff's negligence; (3) for the plaintiff's assumption of the risk.

The doctrine is well settled here, that in a case like this, the untoward event which works injury does not of itself raise the presumption of a defective machine, and therefore,

of negligence by the master; but there must be other  
2 testimony, direct or circumstantial, that the loom injured the weaver because it was defective in its parts and that such defect was the result of the master's neglect. *Edgens v. Mfg. Co.*, 69 S. C. 530, 48 S. E. 538.

The accident occurred in this way: The weaver stands in front of his loom, ready to start it; on the right end of the loom there are two pulleys, one tight and one loose; a belt runs from these pulleys to the source of power; when the belt is on the loose pulley, the loom's parts are motionless; when the belt is on the tight pulley, the power is applied and the parts of the loom start to move; the belt is shifted from one pulley to the other by the agency of a small lever, in easy and safe reach of the hand; on the left end of the loom is a small wheel, by the hand movement of which the weaver adjusts the harness, and by which also the shuttle, when the shuttle has stopped, may be pushed into one of its boxes; the shuttle must be in one of the boxes before the loom starts to move, so that one of the picker sticks may drive it to the box at the opposite end of the loom.

In the event now under consideration the loom had stopped, or in the language of the shop, it had slammed; and that means something more than stopping, but just what, the witnesses do not make it clear. The shuttle had

3 stopped betwixt the boxes; with her left hand the weaver took hold of the wheel on the left to adjust

REP.]

November Term, 1918.

the harness, and with her left hand was moving the shuttle to its box; she did not touch the lever; but the movement of the loom then started, and some part of the loom, it does not appear what part, jerked the weaver and hurt her.

That is the plaintiff's account of the event. That account does not show any defect in the looms. The only other evidence relied upon to show a defect, is that a loom fixer had been called to that loom the afternoon before; and that all the looms in the mill, after eight years' use and in the year after the event, were discarded and sold for junk. It does not appear that the loom fixer found any defect in the loom, much less the defect, if any, which is now complained of. The loom fixer by common knowledge is called for many purposes, and his appearance, and that alone, at a machine is not evidence of a defect. His nonappearance could have been relied upon as neglect; but hardly his appearance.

If he appeared, the inference is that he remedied the defect, if there was one. There is no testimony to rebut that inference.

All the looms were removed, the inference if not warrantable that all the looms had the defect here alleged; had this particular loom alone had been put out of the mill, there would be room to conclude it was defective.

There was no evidence of a defect, and none of the master's neglect.

The other exceptions need not be considered, because they now become irrelevant.

The judgment is reversed and the complaint is dismissed.

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FOOTNOTE—The authorities on the presumption of negligence of master from unexplained starting of machinery injuring servant are collated in notes in 1 L. R. A. (N. S.) 298, and 44 L. R. A. (N. S.) 1050.

8795

CANNON v. BAKER *ET AL.*

(81 S. E. 478.)

## WILLS. CONSTRUCTION. ESTATES DEVISED. DEEDS. FRAUD.

1. Testator devised land to a niece and nephews, and gave to two brothers and a sister "and to the male issue of their bodies" his other lands, and declared that the other lands should not be sold out of the family, but permitted a sale by a devisee to either of the other devisees at a specified sum, and a devisee purchasing the share of another devisee should take subject to the same limitations, and provided that the daughters of the brothers should receive at the death of the brothers, shares out of the personal estate, to equalize them for the land devised to the male issue of the brothers. *Held*, that the sister took a life estate, with remainder in fee to her male issue.
2. Where the Court, in stating the issues, misstates them, a party must call its attention thereto at the time, or he cannot complain.
3. Fraud inducing a conveyance may be set up, not only against the one who perpetrated the fraud, but against one claiming under the conveyance.
4. Where a devisee in remainder in fee accepted deeds from the life tenant, or from a grantee of the life tenant, which conveyed to him an estate for life, with remainder to his wife for life, with remainder to their issue, subject to the provision that all interest of any beneficiary should be invalidated by any threatened levy to satisfy any debt against any of the beneficiaries, the question whether the devisee claimed under the will or under the deeds was one of fact for the jury.
5. The statute limiting the time in which an action may be brought for fraud does not limit the time in which one may defend against a deed procured by fraud.
6. Where the issue was whether a wife derived a life estate under a deed to her husband for life, with remainder to her for life, with remainder over to their issue, the error in a charge that the wife did not obtain a life estate until after her husband's death, and that the undisputed proof was that she died first, because on the facts in violation of Const., art. 5, sec. 26, was not prejudicial.
7. Where a party introduced parol evidence to show that decedent did not claim the land in controversy after an attempted levy, a statement made by decedent that he claimed the land under a will devising the same to him in fee after the termination of a life estate, made at the time an instrument admitted in evidence was probated by him and in explanation of it, was admissible, as against the objection that it was self-serving.

REP.]

November Term, 1918.

8. Where there was some evidence to sustain the verdict, it was not error to refuse a new trial, on the ground of absence of testimony to sustain it.
9. A party requesting a charge on an issue cannot complain of the absence of any evidence on the issue.
10. Refusal of a new trial on the ground of the insufficiency of the evidence will not be disturbed on appeal, in the absence of any abuse of discretion.
11. One who enters under a deed with knowledge that the property had been procured by the fraud of his grantor is not estopped from acquiring good title, unless he has gained an unconscionable advantage by reason of the fraudulent deed.
12. To constitute an equitable estoppel, there must have been conduct, acts, language, or silence amounting to a representation or a concealment of material facts, and the party claiming the estoppel must have acted on it, and thereby changed his position for the worse.

Before SPAIN, J., Aiken, April, 1913. Affirmed.

Action by W. S. Cannon against Elizabeth L. Baker and others, to recover possession of an undivided interest in real property, and partition thereof. Issue of title was submitted to a jury, and resulted in a verdict for the defendant. From the judgment entered thereon plaintiff appeals. The facts are stated in the opinion of the Court.

*Messrs. Croft & Croft, for the appellant, cite: Devisees under will of Andrew Dunbar took fees conditional: Ambiguous clauses cannot control former express gift: 120 Am. St. Rep. 734; 32 Am. St. Rep. 167. The whole will must be construed together: 1 DeS. 135; Bailey Eq. 9; 26 S. C. 454; 3 Jarman, Wills, 704-707; 16 S. C. 220. According to rules of law: 9 Am. St. Rep. 32; 3 Jarman, Wills, 703-707; 1 McC. Ch. 72. Where there is doubt as to quantity of estate: 3 Jarman, Wills, 704-707; 1 Rich. Eq. 401; 16 S. C. 293, 296, 297; 52 S. C. 558. Attempted restraint on alienation: 4 ed. Washburn Real Property 23; 15 Ga. 103; 20 Barb. 455; 38 Me. 18; 4 Kent. 126; 25 Am. St. Rep. 584; 40 Cyc. 1714. Expression of wish against alienation*

*not expression of will:* 2 Hill Ch. 490; 3 Strob. Eq. 225; 12 Cyc. 404. *Presumption that estate was absolute rather than qualified:* 3 Strob. Eq. 211; 114 Am. St. Rep. 14. *Implication to cut down estate first granted neither necessary nor mandatory:* 77 S. C. 458, 459; 1 Mc. Ch. 70, 71, 72, 77, 79, 81, 86, 87; 1 Rich. Eq. 401; 3 Strob. Eq. 215; 114 Am. St. Rep. 148; 87 S. C. 60; 93 S. C. 215; 105 Am. St. Rep. 472; 20 Am. St. Rep. 418; 110 Am. St. Rep. 517; 2 Speer's 794; 29 S. C. 470; 3 Pom. Eq. Juris. 1014; 108 U. S. 725; 5 S. C. 470; Story's Eq. 1069; 120 Am. St. Rep. 734; 138 Am. St. Rep. 217; 2 McC. Ch. 307; Am. St. Rep. 32; 83 Am. Dec. 573; 100 Am. Dec. 562; 37 Am. Dec. 523; 97 Am. St. Rep. 744; 47 S. C. 296. *Fraud in conveyance:* 20 Cyc. 42; 90 S. C. 214; 16 S. C. 334; 1 Bailey Eq. 221; 19 S. C. 402, 403; Kerr on Fraud & Mistake 48. *Right to attack deed for fraud barred by statute:* 16 S. C. 216; 33 S. C. 35; 38 S. C. 499, 500. *Estoppel:* Kerr on Fraud & Mistake 296-299; 72 S. C. 271.

*Messrs. Henderson, for respondent, cite:* Context shows issue used as term of purchase: 59 S. C. 137; 11 S. C. 359; 1 Summer 214-247; 7 Rich. Eq. 407; 91 S. C. 303; 83 S. C. 269; 67 S. C. 135, 307; 86 S. C. 260, 338, 460. *Estoppel in pais legal issue triable by jury:* 89 S. C. 391-394. *Charge on estoppel:* 13 S. C. 370. *Adverse possession on issue of title:* 59 S. C. 449. *Delivery of deed issue for jury:* 89 S. C. 351; 85 S. C. 386. *Charge on fraud as affecting validity of deed:* 82 S. C. 206; 91 S. C. 490. *Declarations of deceased party in explanation of this act shown by opposite party in interest:* 95 S. C. 138; 36 S. C. 598; 18 S. C. 194.

April 20, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

Andrew Dunbar made the following will:

"State of South Carolina, Barnwell District.

In the name of God. Amen.

I, Andrew Dunbar, of said State and district, of feeble body but of sound mind and disposing memory, do make, ordain and publish this, my last will and testament:

First. I will and desire all my just debts be paid.

Secondly. I will and bequeath unto my niece, Caroline F. Prentis, and nephews, Frankline I. Boyd, Robert D. Boyd, Reuben A. Boyd and Jefferson W. Boyd, my tract of land known as the mill land, to be equally divided to them and their heirs, share and share alike.

Thirdly. I will and bequeath unto my brothers, James and Robert Dunbar, and my sister, Mary Cannon, and to the male issue of their bodies, all my other lands, including the homestead, and lands adjoining, to be equally divided between them, share and share alike. These lands I desire not to be sold out of the family, and have, therefore, valued them at the sum of fifteen thousand dollars, a share therefore being five thousand dollars; if, therefore, either of my brothers or my sister should at any time become dissatisfied with the part he or she may have allotted to him or her, and prefer to have five thousand dollars than his or her interest in said land, it is my will that he or she being thus dissatisfied and preferring the money, shall, on receipt of said sum of five thousand dollars, forfeit and lose all his or her interest and estate of, in and to all and singular the said land, which interest and estate shall accrue to the party paying the money, and shall vest solely in said party, subject, however, to the same limitations and restrictions as is in the first clause; and I further will and desire that my nieces, the daughters of my brothers, James and Robert, shall receive at the death of their respective fathers, shares out of my personal estate sufficient to equalize them for the land hereby and herein willed and bequeathed to the male issue of my said brothers, the daughters of each of my said brothers receiving their portions from the respective share of their



deceased father; and I further will and bequeath unto my said brothers, James and Robert, and my sister, Mary, and their heirs, all the rest and residue of my estate of whatever character or kind, to be equally divided between them, share and share alike, subject, however, to the limitations and restrictions above, and subject, furthermore, to limitations and bequests hereafter to be made.

Fourthly. I will and bequeath one thousand dollars to be retained by my executors, to be spent in placing or having made a good and substantial iron railing around the graveyard, and if this sum is not sufficient, I will and desire the work to be done and each of my said brothers and sister to bear equal portions of the excess.

Fifthly. I will and bequeath unto my kinswoman, Rebecca Wimberly, one thousand dollars.

Sixthly. It is my will and desire that my executors shall take care of my faithful servants, Tony and Butty, and to their care I commend them.

Seventhly, and lastly. I hereby nominate and appoint my brothers, James and Robert Dunbar, and as my Robert L. and Elmore Dunbar, executors to this last will and testament.

In witness whereof I have hereunto set my hand and the seal this the 23d day of March, in the year of our Lord one thousand eight hundred and sixty-six.

(Signed) ANDREW DUNBAR. (L. S.)

Signed and sealed in the presence of, as witnesses as below, and in the presence of each other, the day and date above written.

James I. Wilson,  
Thos. W. Chambers,  
W. L. Dixon."

The first question in this case is what estate did Mrs. Mary Cannon take? Respondent claims that Mrs. Cannon took a life estate with remainder to her male issue, to wit,

REP.]

November Term, 1918.

her two sons, Dr. William S. Cannon and Robert W. Cannon. The appellant claims that Mrs. Cannon took a conditional fee.

The solution of the question is not without its difficulties. Not satisfied with the perplexing questions inherited with the land, some one (it is a question who) has had executed and put on record several deeds to complete the confusion as far as possible. On July 26th, 1875, Mrs. Mary Cannon conveyed to Robert Dunbar a part (450 acres) of the land she had received from Andrew Dunbar, and on the same day Robert Dunbar conveyed to Dr. William S. Cannon 175 acres of the 450 acres that day conveyed to him. That deed was to Dr. Cannon for life, then to his wife, Mary H., for life, with remainder to their issue. On that same day, 26th July, 1875, Mrs. Mary Cannon conveyed to Dr. W. S. Cannon the home place, said to contain twenty acres. This deed was to him for life, then to his wife, Mary H., for life, with remainder to their issue. Mrs. Mary Cannon and Mrs. Mary H. Cannon both died. Dr. William S. Cannon is the father of the parties to these proceedings. All the children moved away and married, except Miss Lizzie Cannon, who stayed at home with her father. Dr. Cannon was a physician of large practice, and seems to have been unskilled in business affairs, and "Miss Lizzie" managed the farm and household affairs. While things were in that condition, "Miss Lizzie's" brothers and sisters executed a deed of their interests in these two places to her, the interests conveyed to terminate on her death or marriage. Subsequently, Dr. Cannon conveyed to "Miss Lizzie" his interest in the land. Dr. Cannon then died, and "Miss Lizzie" married Mr. Baker. The deeds from Mrs. Mary Cannon and Robert Dunbar both contained this provision: "*Provided, nevertheless, That if at any time the said tract of land be threatened with levy or seizure by process of law to satisfy any debt or claim against any of the beneficiaries above named, who are at the time in lifetime possession thereof*

(that is, if said levy is actually at the point of being made), then, and in that case, I desire that all interest and ownership whatsoever held by said beneficiary be invalidated and cease to exist, the same as if said incumbent beneficiary were dead, and all right, title and claim whatsoever to pass into the possession of the beneficiary next in order of above named succession."

The records of the clerk's and sheriff's office show a judgment and execution against Dr. Cannon not marked satisfied. There was evidence to show that the sheriff went down to Dr. Cannon's, but did not levy, and that afterwards Dr. Cannon said that his wife, Mrs. Mary H. Cannon, owned the property. The plaintiff and the defendants in like interest (all except Mrs. Baker) claim that they are tenants in common, and ask partition. Mrs. Baker claims to own the whole land in fee.

This case was tried on an issue of title and the jury found for Mrs. Baker, the respondent.

The appellants claim :

a. That under the will of Andrew Dunbar, Mrs. Mary Cannon took a conditional fee and, there being "male issue," the condition was fulfilled and her deed conveyed the fee and cut out the "male issue" as such, and that Dr. William S. Cannon and his grantee can only claim under the deeds of Mrs. Mary Cannon, and under those deeds Dr. Cannon took only a life estate at best, and the life estate was destroyed by the levy under the execution, and that they, as succeeding beneficiaries under those deeds, are tenants in common with Mrs. Baker, the respondent.

b. That even if Mrs. Mary Cannon took a life estate under the will of Andrew Dunbar, yet, inasmuch as Dr. Cannon accepted these deeds and saved his property from the sheriff by claiming under them, that he and his grantee are estopped now to disclaim these deeds and are bound by the life estate and forfeiture thereunder.

c. That the respondent accepted a deed from them, which provided that the land should revert to them upon her death or marriage. That she is now married, and she is estopped by the acceptance of that deed to deny the forfeiture and claim title in herself.

The respondent claims:

a. That under the will of Andrew Dunbar, Mrs. Mary Cannon took a life estate only, with remainder in fee to Dr. Cannon and R. W. Cannon, as purchasers, and the deed of Dr. Cannon to the respondent conveyed a fee to her.

b. That the deeds of Mrs. Mary Cannon to Robert Dunbar and Dr. Cannon were fraudulent and void, but at most conveyed and could convey only her life estate.

c. That the respondent is not estopped by these deeds to set up fraud or to disavow them because Dr. Cannon did not accept them, or claim under them, and the appellants lost no right under them and lost no right by reason of them.

There are sixteen exceptions, but appellants thus state their case:

1. "The first, second and seventh exceptions raise the same questions as to the construction of the will of Andrew Dunbar, so they will be considered together. The error charged is that the Circuit Judge instructed the jury that under the terms of the will of Andrew Dunbar, Mary Cannon, the elder, took a life estate, with remainder over to her male issue, as purchasers and not by descent."

The question here is between a conditional fee and a life estate. The words, "To Mary Cannon and her male issue," are apt words to create a conditional fee, but, like all expressions of this sort, they must be controlled by the other

1 portions of the will. The will shows a desire to have the property kept in the family. There being no disposition beyond the male issue, the male issue, under the statute, would take a fee. Mrs. Cannon may sell, but by a sale she shall forfeit and lose all her interest and estate," and the purchaser takes the land, "subject, however, to the

same limitations and restrictions as is in the first clause." The purchaser is to take, not subject to similar, but the same limitations. It may be said it would be monstrous to hold that the purchaser was required to pay full value, to wit, five thousand dollars, for land encumbered with a remainder in favor of the male issue of Mrs. Cannon. It is not altogether fair to require a sale for a full price when there were any restrictions whatever. The difference is in degree not in kind. The will shows that there was male issue at the time of the making of the will. The so-called limitation was, therefore, no limitation, and that provision, a subsequent provision, would be treated as meaningless. It may be that the word "same" might be construed to mean "similar," if there was nothing else. The will does not stop there. It goes on to provide that his "nieces, the daughters of my brothers, James and Robert, shall receive, at the death of their respective fathers, shares out of my personal estate sufficient to equalize them for the land hereby and herein willed and bequeathed to the male issue of my said brothers." If this was a conditional fee, then the brothers took nothing. See *Izard v. Izard*, 8 S. C. (Bailey's) Equity 234. The words "male issue" merely defined the nature of the estate given to Mrs. Cannon, like the word "heirs" in a conveyance in fee. Mrs. Cannon took a life estate, with remainder in fee to Dr. Cannon and R. W. Cannon, her male issue in fee.

These exceptions are overruled.

2. "Exceptions three and four can be considered together, as they relate to the charge on estoppel. Succinctly, the error charged is that the Circuit Judge cited wrong issues to the jury, which were inapplicable, and, in fact, misled the jury, especially for the reason that, in the plaintiff's third exception, no contention was made that those facts constitute estoppel. And, further, that by selecting particular pieces of the evidence he thereby limited all evidence as to estoppel on behalf of the plaintiff; whereas, he should have

left it to the jury on the whole case from all the facts and not those alone selected to determine the question of estoppel."

These exceptions cannot be sustained. His Honor was simply stating the issues and the basis of the estoppel.

2 If he misstated the issue, he should have had his attention called to his mistake at the time.

3. "The ninth exception charges error in submitting to the jury the question of fraud in the deed to the thirty-acre tract. This land was derived from Mary Cannon as a common source, and does not pass under the will of Andrew Dunbar. The Circuit Judge's charge to 'bear in mind' that the defendant attacks this deed on the ground of fraud, sent the question to the jury to be determined under the ruling as charged previously, thereby making all the requests on fraud applicable to the same. It was improper, irrelevant and inapplicable, and could only mislead the jury, as it was impossible, from the facts in the case, for a question of fraud to arise. The broad principle upon which we rely is, that no person can set up fraud except he who has suffered an injury; and, secondly, he can only set it up against those persons who were parties to the transaction."

Fraud may be set up to prevent an injury as well as to remedy the evil resulting from fraud. Fraud may be set up not only against those who perpetrate a fraud, but against those who claim the benefit of the fraudulent convey-

3, 4 ance. Here the claim is that Dr. Cannon did not claim under these deeds, but under the will. The effect of the deeds was to cut down his estate from a fee to a life estate, and even that life estate was liable to be defeated by a levy under execution. It would be dangerous to allow a grantor to make a deed in fee and then destroy the fee by making another deed reducing the estate to a life estate or term of years. Whether Dr. Cannon claimed under these deeds or not, was a question of fact properly submitted to the jury.

4. "By the twelfth exception we contend that if Elizabeth Baker, in 1897, when she took the deed, under which she now claims, from her father, knew that the deed of 1875 was a fraud, she would be debarred in six years after such knowledge from setting up that defense against the claimants under the former deed. The cases of *Wilson v. Kelly*, 16 S. C. 216, and *Amaker v. New*, 33 S. C. 35, 11 S. E. 386, hold a principle consistent with this proposition of law, as will be seen in *Jackson v. Plyler*, 38 S. C. 499, 500, 17 S. E. 255."

In *Jackson v. Plyler*, 38 S. C. 499, 500, 17 S. E. 255, there was a mere suggestion that it might be well to object to evidence of fraud not discovered within the statutory period.

*Amaker v. New*, 33 S. C. 34, 11 S. E. 386, does not

5 sustain appellant. The statute limits the time in which an action may be brought, but does not limit the time in which fraud may be available as a defense. Dr. Cannon and his grantee could not have brought an action after six years from the time of the discovery of the fraud, but there is no limit to the time in which one may defend himself from a fraudulent deed.

5. Exception XIII:

"Because his Honor erred in charging in relation to the thirty-acre tract of land, as follows:

'Yes, sir; that is right; Mrs. Cannon never got a life estate until after her husband's death, and the undisputed proof is that she died first.'

"(a) Because said charge was on the facts, in violation of section 26 of article V of the Constitution of South Carolina, one of the issues being that Mrs. Cannon derived a life estate under said deed at the time the levy and execution against said property was made in 1888, and his Honor, therefore, erred in stating to the jury that Mrs. Cannon never got a life estate until after her husband's death."

Even if this statement of an undisputed fact were error, appellant can not complain, as the only effect was to destroy

REP.]

November Term, 1918.

the claim of adverse possession under the deeds of Mrs. Cannon. His Honor said a "man can't hold against his  
6 wife." Mrs. Cannon died in 1904. There could be, therefore, no adverse holding until after Mrs. Cannon's death, and she had not been dead ten years before the commencement of this action; therefore, no title by adverse possession for any claim under the deeds.

6. Exception XIV:

"Because his Honor erred in his ruling in allowing the witness, C. J. Baker, to testify as follows:

"Q. You carried a paper to Dr. Cannon to be probated?  
A. I did; yes, sir. Q. What did he do? A. He was reluctant about signing it at first, and finally said: "Yes; I will sign it; I feel that my mother only had a life  
7 estate in the property." He said he claimed it under the will of Andrew Dunbar. I talked to him twenty-five or thirty minutes. The clause of "male issue" was discussed. He said he was one of the "male issue" of Andrew Dunbar.'

"(a) The error being that it was incompetent to introduce in evidence self-serving declarations made by W. S. Cannon, deceased, in his own favor and in favor of his privies."

This exception cannot be sustained.

The appellant had introduced parol evidence tending to show that after the attempted levy Dr. Cannon did not claim the land. This statement was in direct reply to that evidence, and, further, was a statement made at the time of executing the probate and in explanation of it.

7. Exception XV:

"Because his Honor, the presiding Judge, erred in refusing the motion of the plaintiff for a new trial and to set aside the verdict as to the thirty-acre tract of land, on the following ground:



"(a) Because there is absolutely no testimony whatever to sustain the plea of fraud as to the title of Mary Cannon conveying the thirty-acre tract of land to W. S. Cannon.

"(b) Because there is absolutely no testimony to sustain the plea of title by adverse possession raised by the defendant-respondent.

"(c) That the refusal of his Honor, the presiding Judge, to grant a new trial, or set aside the said verdict, on the grounds aforesaid, was an abuse of discretion."

(a) There was some evidence that Mrs. Cannon

8 was too ill to know what she was doing when she made her deeds. (b) Appellants asked for a charge

9, 10 on adverse possession and cannot complain. (c)

We see no abuse of discretion.

8. Exception XVI:

"Because his Honor erred in refusing to charge the plaintiff's fourteenth request, which is as follows:

"I further charge the jury that if they find from the evidence that W. S. Cannon took possession and exercised acts of ownership over the property in dispute under the claim of title through the Robert Dunbar deed, with 11, 12 knowledge that he had gotten the deed by fraud, then he would be estopped from denying the validity of the same, and he, as well as his privies claiming through him, would be bound by the same.'

"Said request being a sound proposition of law."

This could not have been charged, because it ignored the possibility that Dr. Cannon might subsequently acquire good title. If Dr. Cannon entered under a void title, that did not preclude him from ever acquiring good title and standing upon his good title, unless "the moral policy of the law" required him to surrender the advantage gained by reason of the fraudulent deed. *Whitmire v. Wright*, 22 S. C. 453. Here there was no advantage to him from the deeds attacked. From all that appeared in the record, the result

of the deeds was a loss to Dr. Cannon and he gained no unconscionable advantage which he should surrender.

It is further said that the respondent is estopped by reason of the deed she accepted from her sisters and brothers. Estoppel has been called an odious doctrine. It is not, estoppel from conduct is exquisite justice. So far as it affects this case, two things must appear: 1. There must be some conduct, acts, language or silence amounting to a representation or a concealment of material facts. 2. The party claiming the benefit must in fact have acted upon it in such a manner as to change his position for the worse. (See 2 Pomeroy's Equity Jurisprudence, section 805.) There is evidence in the record that might sustain the first requisite, but there is none as to the second. If the deeds of Mrs. Cannon, Robert Dunbar and the appellants had not been made, the appellants would have had no interest in the land, except that Robert Dunbar surrendered the life estate of Mrs. Cannon conveyed to him by her deed. Neither Robert Dunbar nor those claiming under his life estate are before the Court. If Boyd, the plaintiff in execution, had purchased the estate from those mentioned in the deeds of Robert Dunbar and Mrs. Cannon, after Dr. Cannon declared that his interest had terminated (if he did so declare), and relied on his statement in making the purchase, then Dr. Cannon and the respondent claiming under him would be estopped to dispute the title so purchased. So, too, if the appellants, relying on any statements or conduct of Dr. Cannon, had relinquished any claim or right they would have had, and of which they were deprived by reason of their deed to the respondent, they would have been in a position to claim and receive the benefit of estoppel. We have seen, however, that Dr. Cannon owned the land in fee and had the right to convey the fee and did convey the fee to the respondent, and she is not estopped so far as the parties to this suit are concerned.

The judgment of this Court is, that the judgment appealed from be, and hereby is, affirmed.

MR. CHIEF JUSTICE GARY and MESSRS. ASSOCIATE JUSTICES HYDRICK and WATTS concur in the result.

MR. JUSTICE GAGE did not sit in this case.

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8796

NICHOLSON *ET AL.* *v.* VILLEPIGUE.

(81 S. E. 494.)

ACTIONS FOR RECOVERY OF REAL PROPERTY. PRACTICE. LIFE ESTATES.  
TRIAL. INSTRUCTIONS.

1. The Supreme Court, on appeal from an order of nonsuit at the close of plaintiff's case, had no jurisdiction to determine the facts so as to conclude the Court on a new trial.
2. Whether the plaintiff, in an action for damages for unlawful entry on land, and to recover possession, ever had possession of the land was a question for the jury to determine.
3. The plaintiff, in an action for unlawful entry on land, and for possession, wherein a general denial was interposed, was put upon proof of his possession, and, if he failed to prove that he ever had possession, the possession of the defendant required him to show title in order to recover.
4. An exception to an instruction, in an action for unlawful entry on land, and for possession, that plaintiff introduced the same proof as upon a former trial, could not be sustained on the ground that plaintiff did not introduce a tax deed that he had introduced on the former trial, where such deed was introduced by the defendant, and was before the jury.
5. The defendant, in an action for unlawful entry on land, and for possession, who interposed a general denial, was entitled to rely on the defense that plaintiff failed to prove that he ever had possession, and that the tax deed under which he claimed was void, and did not cover the land in dispute.
6. The failure of the Court to construe deeds in the chain of title of the plaintiff, in an action for unlawful entry on land, and for possession, was not error, where it did not appear that such construction was necessary, and it was not requested.

REF.]

November Term, 1918.

7. Whether a sheriff's deed, under which the plaintiff, in an action for unlawful entry on land, and for possession, claimed title, covered the land in dispute was for the jury, where there was a question whether the land was covered by such deed.
8. That the deed to the grantor of the plaintiff, in an action for unlawful entry, and for possession, may have conveyed only a life estate did not necessarily require a judgment for defendant on plaintiff's death and the substitution of his heirs, where there was no evidence of the death of plaintiff's grantor, since plaintiff's estate would last during his grantor's life.
9. The recital in a deed from the Sinking Fund Commission to one who was its authorized agent of a consideration of "one dollar and other valuable considerations" was not sufficient to show that the transfer was fraudulent, where the value of the other considerations did not appear.
10. Possession is necessary to maintain an action of trespass.
11. Possession is necessary to complete a tax title.

Before GAGE, J., Camden, November, 1912. Reversed.

Action for recovery of possession of land, and damages for trespass committed thereon, brought by C. T. Nicholson *et al* against K. S. Villepique. Verdict for plaintiff. Motion for new trial refused. Defendant appeals from the judgment entered thereon.

*Mr. B. B. Clarke*, for the appellant, contra.

*Messrs. Kirkland & Kirkland* and *E. D. Blakeney*, for respondent, cite: *Discretionary power of Sinking Fund Commission*: 1 Code of Laws, 1912, sec. 95, 83, 88. *Trespass cannot raise question of fraud in title of one on whose possession he intrudes*: 14 A. & E. Enc. of L. 280.

April 20, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

This is the second appeal. The plaintiff alleged that he was seized in fee of a certain tract of land, and that the defendant had taken possession of forty acres of said land. The defendant answered, setting up a general denial and

pleading the ten-year bar of the statute, and the twenty-year presumption of a grant. On the first trial the plaintiff offered evidence to show that he had a deed, which, he claimed, included the land in dispute. That he had been in possession of the land by a tenant, who was put there to keep off trespassers, and had rented the land to the defendant; that the defendant, after the expiration of his lease, had gone into possession and trespassed upon his possession. The defendant also attacked the plaintiff's title. At the close of the plaintiff's case a nonsuit was moved for and granted, on the ground that the plaintiff had not made out a *prima facie* case. This Court reversed the order and held, in short, that: that on a motion for a nonsuit the evidence of the plaintiff must be assumed, for the purposes of the nonsuit, to be true. On a motion for a nonsuit the evidence of the plaintiff is taken to be true, *i. e.*, the statements of plaintiff and his witnesses are treated as proved. This Court said that "not one of these statements may be true, but on a motion for a nonsuit they are assumed to be true." 91 S. C. 234, 74 S. E. 506.

In the former appeal this Court held that where one is in possession of a tract of land he is presumed to have title and can recover from a trespasser who invades his possession, and that the trespasser can not show defects in plaintiff's title in order to defeat the action, *i. e.*, defeat his rights claimed from possession.

No fact was found by this Court, and it had no jurisdiction to find the facts. Under the general denial, the plaintiff was put to proof of his possession, and after all the evidence was in, it was for the jury to decide whether plaintiff ever had possession or not. If the jury came to the conclusion that the plaintiff never had possession, then the plaintiff must stand on his title, because the plaintiff admitted that the defendant is now in possession. The protection thrown around possession (if plaintiff never had possession) is shifted to the defendant and plaintiff is thrown back on

proof of his title and the plaintiff must show title before he can disturb defendant's possession.

The following are the exceptions:

Exception I:

"In charging and holding that plaintiff introduced the same proof at this trial as at the former trial, in that

4 at the former trial plaintiff introduced tax title—conveyance from sheriff of Kershaw county to James G. Gibbes, while at this trial plaintiff failed to do so."

This exception cannot be sustained. The sheriff's deed was introduced by defendant and was before the jury. It could not matter who introduced it.

Exceptions II, III, and IV:

"II. In holding and charging that the 'only way Villepigue can escape the title proved at the first trial and proved now, is to prove that the title is not what it purposes to be, either he has title or those under whom he claims

5 have title. I understand that to be the decision of the Court.' (Meaning the Supreme Court of South Carolina.) The error of law being found in misapprehending the decision of our Supreme Court, and thereby precluding jury from considering testimony tending to prove a complete defense under general denial, to wit: That there was no assessment of the property that was sold for taxes; that the land in dispute was not embraced in tax deed; that plaintiff, or those under whom he claimed, had never been in possession of the land in dispute.

"III. In assuming in his charge that Nicholson had been in possession of the land in dispute.

"IV. In charging and holding that the only ground that defendant could rely on in this case was adverse possession. The error of law being found in depriving defendant of the benefit of his general denial and the evidence offered thereunder, to wit: Evidence tending to show no possession on the part of plaintiff, or those under whom he claimed; the

invalidity of sheriff's deed; that the land in dispute was not covered by sheriff's deed."

These exceptions are sustained for the reasons set forth above.

Exception V:

"In failing and refusing to construe deeds in plaintiff's chain of title on the ground that they had already  
6 been construed by our Supreme Court, the error of law being found in not passing upon points made at this trial which were not before the Circuit Court or Supreme Court at the former trial.

The case does not show that the sheriff's deed needed construction or that it was requested.

Exception VI:

"In not holding and charging that it was for the jury to determine whether or not sheriff's deed covered land in dispute; (b) that sheriff's deed to Gibbes only created a life estate, and therefore, Gibbes' deed to plaintiff created  
7, 8, 9 a like estate; (c) that it appearing on the face of the deed from the Sinking Fund Commission to Gibbes certain badges of fraud, to wit, a nominal and illegal consideration, a private sale by said commission to its authorized agent upon undisclosed and unauthorized terms, it was for the jury to determine whether or not said sale was fraudulent, and if so, it was void."

The first point is well taken; there was a question as to whether the land was covered by the sheriff's deed or not.

(b) This question does not appear to have been made in the Circuit Court. Even if it had been made, the deed would have been for the life of Gibbes and not of Nicholson, and the case does not show that Gibbes is dead, or that any estate that may have been conveyed for his life was terminated, or even that only a life estate was conveyed to Gibbs.

(c) There is nothing in the case upon which to base a charge of fraud or illegality. The consideration is "one

dollar and other valuable consideration." It does not appear what was the value of the other considerations. The Courts cannot find fraud on no evidence.

Exception VII:

"That his Honor erred in not granting the motion for a new trial on the first ground made therefor, to wit: 'In not holding and instructing the jury that the tax deed from Sheriff R. B. Williams to Nicholson was null and void unless Nicholson went into possession of the land under it,' where the issue was squarely before him, the error of law being found in holding a tax deed valid without previous assessment and without possession thereunder.

"Also, on the second ground made therefor, to wit: 'In instructing the jury that the Supreme Court had passed upon the validity of the deeds making up plaintiff's title, when evidence was before the Court to the effect that there was no assessment of property before sale by sheriff, and the land in dispute could not be identified by the boundaries given in the sheriff's deed,' the error of law being found in instructing the jury that the Supreme Court had decided a question where certain material evidence was not before it, and certain points never raised, and making such decision applicable to an entire change of conditions.

"Also, on the third ground made therefor, to wit: 'In taking away from the consideration of the jury what defendant's attorney had argued was the main issue in the case, the question as to whether plaintiff or defendant had prior possession, the error of law being found in assuming that because the Supreme Court had decided this question, on a motion for a nonsuit, that such decision was applicable to the trial of the case when additional evidence was adduced."

(a) The case contains no such deed. Possession 10, 11 is necessary to maintain an action for trespass and also to complete a tax title.



(b) It is not entirely clear just what is the error complained of here. The assessments spoken of in the case were subsequent to the sheriff's deed and could not affect it.

(c) This is sustained, for the reasons above stated.

Exceptions VIII and IX, if errors at all, were errors of that special trial, and as the case is to be sent back for a new trial, are now academic and need not be considered.

The judgment is reversed and the case is remanded to the Circuit Court for a new trial.

MR. JUSTICE GAGE did not sit in this case.

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8797

TALBERT v. TALBERT *ET AL.*

(81 S. E. 644.)

MORTGAGE. EVIDENCE. FRAUDULENT CONVEYANCES.

1. Person in possession of negotiable note payable to bearer and accompanying mortgage is *prima facie* the owner thereof.
2. Testimony that a paper, alleged to be lost, was deposited for safe-keeping in defendant's bank, and cannot after search be found and notice to defendant to produce, is sufficient to admit secondary evidence as to its contents.
3. A holder of a written obligation for payment of money cannot be affected by uncommunicated declarations of maker or prior holder.
4. A mortgage being unsatisfied of record is a circumstance to put persons dealing with mortgagor on inquiry as to who holds it and whether or not its lien has been discharged.
5. Evidence too indefinite to show assignment of note and mortgage in question to be voluntary or fraudulent as to subsequent creditors of mortgagor.

Before SHIPP, J., Abbeville, December, 1913. Affirmed.

Action by Mrs. M. L. Talbert against John L. Talbert, The Farmers Bank and G. J. Sanders, Trustees in Bankruptcy, for foreclosure of a mortgage. The Farmers Bank appeals.

The decree of the Circuit Court was as follows:

The complaint in the above stated case is for the foreclosure of the mortgage executed by the defendant, John L. Talbert, to the Bank of McCormick, dated March 30th, 1908, covering the lot described in the complaint and securing a note of the same date, payable one year after date, in the sum of two thousand seven hundred eighteen and 29-100 (\$2,718.20) dollars, with interest after maturity at the rate of eight per cent. per annum, and providing that if the note be collected by an attorney that the said John L. Talbert would pay ten per cent. attorney's fees for the collection thereof, in addition to the principal and interest. The execution of the note and mortgage is admitted by the Farmers Bank of McCormick, which is the only party answering the complaint. The other parties have made default.

The Farmers Bank of McCormick denies in its answer served herein that the note and mortgage have been assigned to the plaintiff herein, as alleged in her complaint, but alleges that at the time of the alleged assignment, the money paid to the Bank of McCormick was furnished by John L. Talbert and that the mortgage was in fact paid off, but that if it was assigned, it was for the purpose of defrauding creditors, existing or subsequent. The defendant, the Farmers Bank, also alleges that subsequent to the date of the alleged assignment, the said John L. Talbert, in certain transactions, became largely indebted to the bank, and that although the money was furnished by him to pay off the mortgage, nevertheless, it was assigned to his mother, the plaintiff, Mrs. M. L. Talbert, for the purpose of defrauding his subsequent creditors, and that they entered into a conspiracy to this effect. He further alleges that the plaintiff, Mrs. M. L. Talbert, well knew that he was borrowing large sums of money from the defendant, the Farmers Bank of McCormick, and that he was representing the mortgage to be paid and that she acquiesced in the statement and assisted him in defrauding the bank.

The whole question turns upon whether or not there was an assignment in this case and as to whether the plaintiff *bona fide* purchased the note and mortgage upon which the action is based. The testimony shows that the mortgage is lost. H. Q. Talbert, who was the managing agent for the plaintiff, and John L. Talbert, both testify that the mortgage in this case was deposited with the Farmers Bank for safe-keeping along with the deed and insurance policy, which the bank produces, and the officers deny this. Notice was given to the bank to produce the papers, which it failed to do for the reason, as stated by the officers, that they did not have the papers. The Talberts, both, testify that they have searched in every other place where the paper might be and they have been unable to find it. It appears to the Court that it is not within the power of the plaintiff to produce the paper, and secondary evidence as to the contents of the alleged assignment is therefore admissible and it is so held.

Besides this, the testimony shows that the note and mortgage were purchased and that the consideration for the assignment was actually paid and the note and mortgage were delivered to the agent of the plaintiff herein. If this was her money and the transaction was *bona fide*, the delivery of the papers upon the payment of the purchase money therefor was a sufficient assignment to be enforceable in a court of equity, and it is so held and adjudged.

The question, then, for consideration is: Did the plaintiff, Mrs. M. L. Talbert, purchase the note and mortgage *bona fide*? The testimony abundantly proves, and I find, that about February 20th, 1909, she purchased the note and mortgage and took an assignment therefor. I find from the testimony, that at such time she had on hand about the sum of one thousand three hundred dollars, which she had obtained from a dividend in the matter of Britt & Company, bankrupts, and from the sale of cotton and stocks, and in various ways. On that date, or thereafter, John L. Talbert, gave her a check for four hundred dollars on a debt which

REF.]

November Term, 1918.

was due her, as he testifies, for lumber in building the house on the lot now sought to be sold. There is no testimony to dispute this. Six hundred dollars of the money, the plaintiff borrowed from Mrs. Corriesande Talbert, wife of John L. Talbert, giving her a note therefor dated February 20th, 1909, and the books of the bank show that the check for this amount of money was paid two days later. Her son, R. C. Talbert, a very short while before, had received from the bankrupt estate of Britt & Company two hundred twenty-six and 34-100 dollars and out of this sum he gave his mother two hundred and twenty-five dollars, with which she purchased this mortgage, and he and his father, H. Q. Talbert, on November 20th, 1909, borrowed about two hundred dollars more from the bank of McCormick, which made up the amount of the mortgage. There is no testimony to dispute any of these facts and the Court must consider this as established. Such being the case, the Court finds, as a matter of fact, that Mrs. M. L. Talbert did purchase the note and mortgage on February 20th, 1909, or thereabouts, and that she paid the purchase money therefor and took a valid and *bona fide* assignment of the note and mortgage. Counsel for the defendant bank called attention to the fact that John L. Talbert's check and the check of Mrs. Corriesande Talbert were not paid until February 22d, when the testimony shows that the assignment of the mortgage was on February 20th, 1909, and that some of the witnesses testified that the purchase price of the assignment was all paid in currency. This happened a considerable time ago, and the witnesses may be easily mistaken as to the medium of payment. The greater portion of the consideration was likely paid in currency, but it seems likely to the Court that the four hundred dollar check of John L. Talbert and the check of six hundred dollars of Mrs. Corriesande Talbert were delivered to the bank as a part of the consideration of the assignment, and that they were not cashed until two days later. The testimony certainly shows that these two checks

entered into the purchase of the note and mortgage. Counsel for the defendant has failed to offer any testimony going to show that either plaintiff knew John L. Talbert was borrowing large sums of money from the defendant bank, or that she entered into any conspiracy to defraud the bank, or that she knew of any likelihood that the bank would be defrauded. The mortgage which she purchased was on record and it was notice to the world that it was outstanding and even if she had known that John L. Talbert was dealing with the bank, there was no requirement of law that she should notify the bank that she intended to claim a lien under a mortgage which was of record and which was itself notice of the lien. If John L. Talbert had furnished the money to pay for the mortgage and had it assigned to his mother with the intention of withholding his property from creditors, even though subsequent creditors, and she had entered into the scheme with him to defraud the subsequent creditors, the assignment would be void, but there is no testimony to establish such fact and I cannot so find. All the testimony as to the conversation between John L. Talbert and bank officers is incompetent as to plaintiff, as is the testimony as to conversation between bank officers and officers of the Bank of McCormick.

Upon consideration of all the testimony in this case, I am of the opinion that the plaintiff is entitled to a foreclosure of the mortgage for the payment of the mortgage debt. *Lis pendens* having been duly filed and proof of default having been made as to the defendant, G. J. Sanders, as trustees in bankruptcy of John L. Talbert, and John L. Talbert, and it appearing to the Court that there is due upon the plaintiff's mortgage debt the sum of three thousand seven hundred fifty and 12-100 (\$3,750.12) dollars, together with ten per cent. of the said amount as attorney's fees, making a total of four thousand one hundred twenty-five and 11-100 (\$4,125.11) dollars.

It is ordered, adjudged and decreed, that the premises described in the complaint be sold by the master of Abbeville county, at public auction at Abbeville courthouse, on sales day in January next, or some succeeding sales day, without the further order of the Court, for cash, after due advertisement and public notice, as required by law.

It is further ordered, that upon the compliance with the terms of sale, the master do execute to the purchaser at such sale, good and sufficient title in fee simple to the premises so sold.

It is further ordered, adjudged and decreed, that out of the proceeds of sale, the master do pay any taxes and assessments due against the said lands, and that he do next pay the costs and disbursements of this action, to be hereafter taxed, except the costs of defendant's witnesses, and that he do also pay the expenses of such sale and that the balance of the proceeds of sale, or so much as shall be necessary to pay the same in full, be applied to the payment of plaintiff's mortgage debt, as above reported with interest at seven per cent. from October 20th, 1913.

It is further ordered, that the master do take receipts for all sums so paid, and that he file them in his office and keep them on file, and that he do report his proceedings hereunder with all convenient speed, certifying the amount remaining due, if any, upon the mortgage debt of the plaintiff, after the sale of the said premises.

It is further ordered, that the purchaser at such sale be let into possession of the said premises upon the production of the master's deed thereto.

It is further ordered, adjudged and decreed, that should the purchaser at such sale fail to comply with the terms of sale within five days thereafter that the master do resell the said premises on the same or any succeeding sales day, without the further order of the Court on the same terms and conditions and at the risk of the former purchaser.

And, it is further ordered, adjudged and decreed, that the defendants, and each of them be forever barred and foreclosed of all right, title, interest and equity of redemption of, in, or to the said premises, or any part thereof.

The following is a description of the premises ordered sold:

"Lots Nos. 7 and 8 of land, situate, lying and being in the town of McCormick, in the county of Abbeville, State of South Carolina, each lot having a frontage of one hundred feet on Cherry street and running back two hundred feet to the back lots Nos. 3 and 4, in the same block, being the lots in town of McCormick, on which is situated the residence at that time, and now occupied by said John L. Talbert, as a residence." S. W. G. Shipp, Judge Eighth Circuit. December 14th, 1913.

*Mr. Wm. N. Grayden*, for appellant, cites: *Sufficiency of evidence to show loss of paper*: Greenleaf Ev., sec. 558; 41 S. C. 194. *Proof of existence of paper*: Greenleaf Ev., sec. 560, 569. *Circumstances to show fraudulent assignment*: 66 S. C. 107; 38 S. C. 279; 32 S. C. 186; 20 Cyc. 793; 29 S. C. 395; 58 S. C. 418. *Right of creditor to attack assignment*: 38 S. C. 496. *Badge of fraud*: 75 S. C. 334; 14 Rich. L. 237; 38 Am. St. Rep. 667; 20 S. C. 764, 771.

*Messrs. Greene & Hill*, for respondent.

April 20, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This was an action for foreclosure and sale by plaintiff against the defendants, commenced August 23, 1913. After issue joined it was referred to the master to take testimony. Upon the pleadings in the case, and the testimony taken by the master, the cause was heard by his Honor, Judge Shipp,

at the October term of the Court, 1913, and he subsequently, to wit, December 19, 1913, filed his decree in favor of the plaintiff. For a proper understanding of the case his decree should be embodied in a report of the case. After entry of judgment the Farmers Bank duly appealed therefrom. The exceptions, twenty-two in number, will not be taken up *seriatim*, but only the questions raised by them considered. The first question, covered by the first seven exceptions, is that there was not sufficient evidence to allow secondary evidence of the alleged assignment to be offered at all, and even if it was sufficient to let in secondary evidence the evidence offered did not prove the assignment. The execution of the note and mortgage are not denied, there was testimony that the plaintiff's money paid for the mortgage and note, and that they were delivered to her husband, who was her agent, and his Honor held that there was sufficient evidence of the assignment in equity independent of any written assignment and to this holding there was no exception. As was said in *Stoddard v. Hill*, 38 S. C. 385, 17 S. E. 138: "An assignment of note and mortgage is not required by law to be executed in the presence of witnesses, and, therefore, when unattested by a subscribing witness, may be proved by any one who was present and saw the assignment executed. \* \* \* The complaint avers that the plaintiff is now the legal owner and holder of said mortgage. The note is payable to bearer. In *Coleman v. Dunlap*, 18 S. C. 594, it was held when a note was payable to bearer, and plaintiff stated he was the owner of the note, that inasmuch as he had possession of the note, which itself was *prima facie* evidence of ownership, such statement was admissible, and was all that was necessary to sustain the action." *Stoddard v. Hill*, 38 S. C. 392, 17 S. E. 138. There is no

1 question but that the plaintiff was in possession of the note and mortgage in dispute, and there is no evidence that anything has ever been paid to her thereon.



There was evidence that after plaintiff got in her  
2 possession the note and mortgage that they were  
deposited in defendant's bank with other papers for  
safe-keeping, and after a thorough search by the Talberts  
of every conceivable place, other than the bank, they cannot  
be found. Notice was given the bank to produce the papers,  
and they testified that the papers were not in the bank. We  
do not think his Honor was in error in finding that the  
papers were lost, and in allowing the contents of the assign-  
ment to be shown by secondary evidence. The appellant  
fails to convince us that his Honor was in error in finding  
the assignment was to plaintiff as the evidence convinces us  
that in fact the assignment was to plaintiff, M. L. Talbert,  
and that she purchased the same, and that the note and mort-  
gage were assigned to her, and she got possession of them  
from the Bank of McCormick, the owners and holders of  
the same, on February 20, 1909, that it was open and unsat-  
isfied on that day, and being in possession of the same she  
was *prima facie* the owner and holder of the same, and the  
burden is on the defendant to show payment, satisfaction,  
or that she is not the owner and holder of the same.

These exceptions are overruled.

The other exceptions impute error to his Honor in holding  
that the plaintiff was the owner and holder of the note and  
mortgage, was *bona fide* innocent purchaser for value, and  
in not holding that she was a fraudulent holder, and that she  
had no interest in it, and that the money paid the Bank of  
McCormick was in fact the money of John L. Talbert, and  
that the mortgage was thereby satisfied, but kept open and  
held by his mother in order to enable John L. Talbert to take  
in, cheat and defraud his creditors, especially the defendant,  
and retained the same in her possession unsatisfied in order  
that John L. Talbert might in the future swindle some one,  
and that there was a conspiracy entered into between the  
plaintiff and John L. Talbert for the purpose of defrauding  
the creditors of John L. Talbert, especially the Farmers

Bank, and that all parties to the transaction were guilty of moral fraud, and that the whole transaction was null and void for this reason, and that he should have found further that Talbert (John L.) was largely in debt at the time of alleged assignment, and that the transfer of the note and the mortgage to the mother was made with intent to delay, hinder, and defraud his creditors, and was therefore null and void.

All the evidence as to communications that John L. Talbert had with the officers of the bank, defendant, and all other parties, when the plaintiff was not present, was objected to when the testimony was taken. This

3 objection was proper and must be sustained as the plaintiff could not be bound or affected by any statement made by John L. Talbert in reference to the transfer and assignment or payment of the note and mortgage in her possession when she was not present when the statement was made. It is true, that the plaintiff purchased the note and mortgage shortly after its maturity. If it be a negotiable note purchased before maturity and transferred before maturity it would have carried with it the same protection to the mortgage its accessory as such paper is entitled to. *Carpenter v. Longan*, 16 Wall. 271; *Dearman v. Trimmer*, 26 S. C. 506, 2 S. E. 501; *Patterson v. Rabb*, 38 S. C. 138, 17 S. E. 463. But there is no contest between her and the maker of the mortgage, they both agree that the mortgage is unpaid and unsatisfied, and the defendant bank is the one who assails it. It is in evidence that the Farmers Bank was not an existing creditor of John L. Talbert at the time of the alleged assignment of the mortgage in suit. The evidence fails to disclose any outstanding indebtedness on the part of John L. Talbert on February 20, 1909, except the debt due his mother. It is true he had been unfortunate and failed in business before this, but his indebtedness had been compromised and settled. No creditor, who was in existence at that time of John Talbert, is before the Court contesting the

rights of the plaintiff. The claim of the appellant did not arise until 1910, nearly two years after the alleged assignment. All of John L. Talbert's creditors, including the Farmers Bank, are subsequent to the assignment, and none are contesting except the Farmers Bank. It was unfortunate that the bank relied on the statement of the officers of the Bank of McCormick that the note and mortgage had been paid, if they made any such statement, the mortgage was on record open and unsatisfied. On December 21, 1910, he gave a mortgage to the Farmers Bank, and on February 9, 1911, he gave another to this bank, and informed Cashier Robinson that the mortgage had been paid. Robinson went to the Bank of McCormick, and on January 20, 1912, got from Britt, cashier, a certificate that the mortgage of John L. Talbert to them (the one now in suit) had been paid. There is no pretense that there is any evidence that the plaintiff was present when the conversations, transactions, and statements were made by John L. Talbert, and Britt to Robinson, and she cannot be bound or affected thereby. If she was the owner and holder of the note and mortgage neither the debtor, Talbert, nor the Bank of McCormick,

4 could legally have it marked satisfied. There is sufficient evidence in the case to find that the appellant was put on notice that the mortgage was open and unsatisfied, and sufficient evidence to charge it with notice that M. L. Talbert claimed some interest therein sufficient for it to make inquiry, and there is sufficient evidence to conclude that Robinson was aware of this fact, and that he failed to investigate sufficiently, but relied on statements of John L. Talbert and Britt. The bank extended credit in first instance with mortgage open, and continued to do so nearly three years after he was deceived by the statement of John L. Talbert. We do not think under the evidence in the case that there was actual or moral fraud in the case, or that the assignment was made with intent to hinder, delay, defeat, or defraud any creditor, or that the assignment was fraudulent

as to subsequent creditors under the cases of *Walker, Evans & Cogswell v. Bollemann Bros.*, 22 S. C. 512; *Jackson v. Plyer*, 38 S. C. 498, 17 S. E. 255; *Gentry v. Lanneau*, 54 S. C. 514, 32 S. E. 523.

We do not think under the evidence that the assignment should be set aside as being fraudulent and voluntary either under the Statute of Elizabeth or the assignment act. Cut

out the incompetent evidence of John L. Talbert  
5 and other witnesses as to statements made by them at various times in reference to the mortgage being paid, and the various transactions of John L. Talbert, which she confessedly had nothing to do with, etc., incompetent by reason of the fact that the plaintiff was not present, and no pretense that she knew of, had notice or authorized any such statements and the evidence to make out defendant's charges and allegations against plaintiff is vague, meagre, indefinite, and unsatisfactory, and does not satisfy, by the preponderance of the evidence the truth of the charge. The appellant has failed to convince us that the transaction, in reference to the assignment and transfer of the assignment, was voluntary, or that there was actual and positive fraud; on the contrary, we are satisfied with the findings and decree of the Circuit Judge, and we see no reason why any of the exceptions should be sustained. All exceptions are overruled.

Judgment affirmed.

MR. CHIEF JUSTICE GARY, *dissenting*. I dissent on the ground, that the testimony shows that the plaintiff was not a *bona fide* holder of the note and mortgage herein.

8798

## WATKINS v. ATLANTIC COAST LINE R. R. CO.

(81 S. E. 426.)

PRINCIPAL AND AGENT. EXISTENCE OF AGENCY. EVIDENCE. ADMISSIBILITY. APPEAL AND ERROR. QUESTIONS REVIEWABLE. RULINGS ON EVIDENCE. QUESTIONS NOT RAISED IN TRIAL COURT.

1. A statement of a person that he is the agent of another does not, in itself, prove agency, but is competent as a circumstance, in connection with other evidence, to prove agency.
2. Evidence introduced without objection cannot be stricken out on motion.
3. A motion to strike out the testimony of a witness for plaintiff that B. had attempted to improperly influence him was properly denied, when made during the cross-examination of the witness, who stated that he did not know for whom B. was working, but that B. had stated that he was working for the defendant, and where the testimony was received without objection.
4. An exception to the overruling of an objection to a question asked a witness must be overruled, where the question was not answered.
5. A point not made in the trial Court, in the motion for nonsuit or for a directed verdict, or a requested charge nor pleaded, is not available on appeal.

Before RICE, J., Marion, April, 1913. Affirmed.

Action by Oscar Watkins against Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals.

*Mr. L. D. Lide*, for appellant, cites: *Declarations of alleged agent inadmissible*: 39 S. C. 444, 535; 72 S. C. 251; 46 S. C. 81; 57 S. C. 142; 49 S. C. 356. *Judgment of another State*: 63 S. C. 542. *Punitive damages*: 147 U. S. 101; 37 L. ed. 97.

*Messrs W. F. Stackhouse and A. F. Woods*, for respondent, cite: *Testimony received without objection*: 51 S. C. 282; 53 S. C. 360; 67 S. C. 180. *Record of conviction in criminal Courts of another State irrelevant*: 3 Strob. 546;

93 S. C. 292. *Punitive damages*: 37 L. ed. (U. S.) 97; 71 S. C. 444; 88 S. C. 421; 89 S. C. 432; 57 L. ed. (U. S.) 1545; 48 L. ed. (U. S.) 268.

April 20, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This was an action for actual and punitive damages for an alleged unlawful ejection from a train by the defendant of the plaintiff, a passenger, and was tried at Marion, S. C., at the April term of Court, 1913, before Judge Rice and a jury. The jury found a verdict for the plaintiff in the sum of one thousand dollars. Before the case was submitted to the jury, and when all the evidence was in, the defendant moved the Court to direct a verdict in its favor as to punitive damages, on the ground that there was no evidence to support the same. This was refused. After verdict a motion for a new trial was made and refused. After entry of judgment defendant appeals. The first exception is as follows: "Because his Honor erred, it is respectfully submitted, in refusing defendant's motion to strike out the testimony of the plaintiff's witness, Stallings, to the effect that one Boatright attempted to bribe or improperly influence him, in that there was no evidence that Boatright was an agent of the defendant, or that the defendant subsequently ratified his acts, and the refusal to strike out such testimony was highly prejudicial to the defendant; and in refusing to grant defendant's motion for a new trial, upon the same ground; and in holding that the refusal to strike out said testimony was not prejudicial to the defendant, in that the plain inference from the testimony of the witness, Stallings, was that the said Boatright attempted to bribe or improperly influence him, and in holding as an additional reason for refusing to strike out the said testimony that it was in before objection, because the fact that the testimony of the witness was based solely upon the alleged declaration of the said Boatright did

not appear until the cross-examination, when the motion to strike out was promptly made."

The basis of this exception is that the Judge refused to strike out the testimony of the witness, Stallings, that Boatright attempted to improperly influence him. No such conclusion could be drawn from his evidence, as a careful examination of it will show, and the evidence was received without objection, no motion was made to exclude or strike it out until after cross-examination. He was allowed to say that he thought Boatright was the agent of the Atlantic Coast Line Railroad, without objection, and later said, that Boatright told him that he was. A statement of a person that he is the agent of another is not in itself sufficient to prove agency, but it is competent as a circumstance to be taken in connection with other evidence to prove agency. It was for the jury to say, under all the circumstances proven, whether Boatright was a volunteer, acting for himself, or the defendant, or some one else. There was a *scintilla* of evidence that he was the agent of the defendant, in some capacity or other, sufficient for the jury to determine whether he was or not. It was within the power of the defendant to have rebutted the evidence that he was the agent of the defendant, and shown that he was not; but the defendant failed to rebut, deny, or explain, when it introduced evidence, his connection, if any, with the case. Evidence introduced, without objection, becomes pertinent and cannot be stricken out on motion. In this case the evidence was received unobjected to, and not until cross-examination was entered into, was the motion to strike out made, and that was when witness said that he did not know who Boatright was working for, but he told him he was working for the defendant. While this was not sufficient to prove agency, it was a circumstance, and if connected with other evidence could establish the fact of agency it would have been competent. As it was received without objection, we think his Honor was not in error. *Ingram v. Sumter Music*

REP.]

November Term, 1918.

*House*, 51 S. C. 282, 28 S. E. 936. Objection for the purpose of taking an exception must be made to the testimony when offered. *Powers v. Oil Co.*, 53 S. C. 360, 31 S. E. 276. "Objection cannot be made to evidence after its admission without objection." *Kiddell v. Bristow*, 67 S. C. 180, 45 S. E. 174. We do not see how this evidence was prejudicial in any way to the defendant, and it is overruled.

Exception two is overruled, as the witness never answered the question excepted to, and his Honor did not rule that the question was competent; the following took place at the trial: "Q. Was H. O. Harvell a witness against you in this whiskey case that has just been tried? Defendant objects, on the ground that there has been no evidence that H. O. Harvell was an agent of the Atlantic Coast Line, and on the further ground that the plaintiff cannot attack a judgment of a sister State. The Court (addressing plaintiff's attorneys): 'Are you trying to attack a judgment of the Courts of North Carolina?' Mr. Woods: We are not trying to do anything of the kind. We are simply asking him if a witness in the case was not now an employee of the Atlantic Coast Line. The Court: This judgment has not been offered in evidence as far as I recall. No judgment has been introduced as I recall." It appears that certain records were then introduced and the motion to strike out overruled, but the question asked was never answered, and the exception was clearly based on a misapprehension as to what occurred. Even if the question had been answered it would have been harmless and could not have probably affected the issues in this case. This exception is overruled.

The third exception is as follows: "Because his Honor erred, it is respectfully submitted, in refusing defendant's motion for nonsuit as to punitive damages, on the ground that there was no evidence whatever of wilfulness on the part of the defendant, and in charging the jury that the plaintiff would be entitled to recover punitive damages, if the plaintiff was unlawfully ejected from a train, although



there was no evidence of wilfulness or wantonness in the case; and in charging the jury that punitive damages will be awarded for any intentional ejection of a person from a passenger train, if such ejection is unlawful, when the testimony of the plaintiff was that he was an interstate passenger traveling on an interstate train, and that he was ejected therefrom by the conductor, in that, under the law as declared by the Supreme Court of the United States, which controls in such a case, such ejection by a conductor would not render the defendant liable for punitive damages in the absence of evidence, of which there was none, that such action on the part of the conductor was participated in, authorized or ratified by some officer of the defendant having executive power."

This exception is overruled, as the point, he was an interstate passenger, on an interstate train, with an interstate ticket, was not made before the Court below, either in a motion to grant a nonsuit, or to direct a verdict, or request to charge. Neither was it plead by way of defense in the answer of defendant. There was sufficient evidence to go to the jury as to punitive damages under the law, as decided in *Myers v. Railway*, 64 S. C. 514, 42 S. E. 598; *Richardson v. Railway*, 71 S. C. 444, 51 S. E. 444; *Tollerson v. Railway*, 88 S. C. 7, 70 S. E. 311; *Smith v. Railway*, 88 S. C. 421, 70 S. E. 1057, 34 L. R. A. (N. S.) 708; *Corley v. Ry.*, 89 S. C. 432, 71 S. E. 1035; *Campbell v. Railway*, 94 S. C. 105, 77 S. E. 745. This exception is overruled.

Judgment affirmed.

MR. JUSTICE HYDRICK concurs in the result.

MR. JUSTICE GAGE did not sit in this case.

8799

## TEDDARS v. SOUTHERN RAILWAY CO.

(81 S. E. 474.)

## CARRIER OF PASSENGERS. EJECTION OF PASSENGER. INSTRUCTION AS TO PREPONDERANCE OF EVIDENCE.

1. Where a passenger informed the conductor that he had purchased a ticket to a certain point, but that the agent negligently gave him a ticket to a nearer point, it was the duty of the conductor to heed the explanation and investigate its truth; and, if he ejected the passenger, and the explanation later turned out true, the carrier would be liable.
2. When a dispute arises between a railroad conductor and passenger as to the ticket or fare, it is the duty of each to give all information to the other that each possesses to aid in the settlement of the dispute, and to give heed to reasonable explanations of the other.
3. Where the Court charged the jury as to the burden of proof, and, at the request of counsel for the opposite parties, charged as to the preponderance of evidence and the credibility of witnesses, and the whole charge could not have misled the jury as to their power and duty in the case, any trivial or technical errors in the charge are not prejudicial.

Before SHIPP, J., Greenwood, September, 1913. Affirmed.

Action by J. H. Teddars against Southern Railway Company. From a judgment on verdict for plaintiff, defendant appeals.

The charge of the Circuit Judge, excepted to, was as follows:

"Now, Mr. Foreman, I charge you, as a matter of law, where a person purchases a ticket from one point on a railroad company's line to another point, and pays the usual fare—the usual fare charged by the company for such passage, why, when he boards a train designed for the handling of passengers, that he has a legal right to passage on such train between the points covered by the ticket he purchases from the railroad company, and it is the duty of the railroad

company to treat the passenger with the utmost care, comfort and safety. That applies to passengers that are lawfully on the train.

“One of the issues in this case for you to decide, in fact the principal issue, is, did the plaintiff purchase of the defendant company or its agent, a ticket from Columbia to Greenville? That is one of the questions in this case. If he did that, what kind of a ticket did he get? Did he get the ticket he called for and paid for? If he paid the usual price for a ticket from Columbia to Greenville, that would entitle to passage from Columbia to Greenville. So that is one of the questions for you to decide. Now, if he bought and paid the usual price for a ticket from Columbia to Greenville, and the ticket agent made some mistake about the ticket, why, the passenger would have a right to rely upon the ticket furnished him by the company or its agent. If, however, there was a mutual mistake—if the ticket agent in Columbia gave him a ticket to Newberry and charged him only the usual fare from Columbia to Newberry, the passenger would only be entitled to ride from Columbia to Newberry, and the company would have a right to demand additional fare from Newberry to Greenville. Of course, if the ticket agent intended to give him a ticket to Greenville, if the plaintiff knew that, and the agent gave him a ticket only to Newberry, and he did not pay for a ticket only to Newberry, he would not be entitled to ride further than Newberry, and it would be his duty, on demand of the company, to pay fare from Newberry to Greenville, if he was going to Greenville. Those are questions of fact for you. But if he paid fare from Columbia to Greenville and they furnished him a ticket to Newberry, he had a right to rely on the ticket furnished him, and if the conductor ejected him, then such ejection would be wrongful, but that depends upon whether or not he paid the ticket agent in Columbia full fare from Columbia to Greenville.

"Now, I have been requested by the plaintiff to charge you certain propositions of law. The first request is:

"I charge you that if a passenger pays the required fare for transportation from one point on the line of a common carrier to another point, and if the agent of the carrier delivers to such prospective passenger a paper purporting to be a ticket giving the right of transportation to the destination designated by the prospective passenger, then such passenger is entitled to ride to such destination, and if the agent of the carrier selling the ticket made any mistake in the form of the ticket, it would nevertheless be the duty of the carrier to consider the explanations of the passenger and to make investigation, and if under such circumstances the passenger were ejected from the train, the carrier would be liable in damages for wrongful expulsion.'

"I charge you that. I also charge you in this connection that when a dispute arises between a passenger and the conductor as to the regularity of the passenger's ticket, then it is the duty of the conductor to heed any reasonable explanation that the passenger might make, and if the passenger makes a correct statement, if it turns out that the passenger made a correct statement to the conductor in explanation, the conductor expels him, why, then the company would be responsible for any damage resulting from the wrongful expulsion. If, however, the conductor heeds the explanations of the passenger and it turns out that those explanations were untrue, why, the company or the conductor would have a right to expel the passenger. In other words, if the passenger was wrongfully on the train, the conductor would have a right to expel him from the train, if the passenger refused to pay for his passage.

"Where a dispute arises between a passenger and the conductor, and the passenger offers an explanation, it is the duty of the conductor, before expelling him, to make a reasonable investigation to ascertain if the passenger's explanation is correct or incorrect. If it appears that he failed to

investigate, and it appears that the passenger's explanation was correct, then the expulsion would be wrongful. If, however, after reasonable investigation it turns out that the passenger's explanation was untrue, that he was wrongfully on the train, the conductor would have a right to expel him. If a passenger is wrongfully on a train, even if the conductor does not make an investigation, he would have a right to eject him. So the question turns on whether or not the passenger is rightfully on a train. So if the passenger in this case was rightfully entitled to ride from Columbia to Greenville, why, then, if he expelled him under those circumstances, the expulsion would be wrongful, and the company would be responsible for any damage the passenger suffered. If, however, the plaintiff had paid his fare only to Newberry, and was endeavoring to ride to Greenville on a ticket entitling him only to go to Newberry, upon demand on the part of the conductor to pay additional fare to Greenville, and upon his refusal to do so, then the company would have a right to eject him, using only such force as was reasonably necessary to affect the expulsion.

"So that the case depends, to a large extent, upon what your conclusions are as to whether or not he purchased a ticket in Columbia. If he purchased a ticket in Columbia, did he purchase a ticket to Greenville?

"Now, it is the duty of the plaintiff in this case to satisfy you of the truth of the allegations in his complaint by the greater weight or preponderance of the testimony. If he establishes his case by the greater weight or preponderance of the testimony, why, then, he would be entitled to recover. If, on the whole case, there is an even balance of the testimony in your minds, plaintiff fails to make out his case by the greater weight of the testimony—if, after considering all the testimony in the case, there is an even balance of testimony in your minds, plaintiff fails to make out his case by the greater weight of the testimony, and it would be your duty to find a verdict for the defendant, because the plaintiff

REP.]

November Term, 1918.

must prove his case by the greater weight or preponderance of the testimony.

"The Court: Anything else?

"Mr. McSwain: Your Honor, have you explained to them the meaning of preponderance of the testimony; that it is not the number of witnesses that constitute preponderance of testimony, but the testimony that the jury believes.

"The Court: Mr. Foreman, when speaking about the greater weight or preponderance of the testimony, we are not speaking about the number of witnesses who testify on either side in a case, but it is that kind of testimony in the case that brings conviction to your minds; that kind of testimony which satisfies you and helps you to arrive at what you believe to be correct and drives conviction. It is that testimony in the case which brings conviction to your minds. It does not make any difference whether one witness testifies against twenty witnesses or twenty against one, but it is that testimony which you believe and brings conviction to your minds. That is what we mean by greater weight or preponderance of the testimony.

"Mr. Dean: Credibility of witnesses.

"The Court: You are the sole judges of whether or not a witness is telling the truth. You are the judges of the credibility of the witnesses who testify. Take into consideration their manner on the stand, interest in the result of the suit, and opportunity for knowing of what they speak."

*Messrs. Cothran, Dean & Cothran*, for appellants, sought to review the case of *Smith v. Ry. Co.*, 88 S. C. 421, and cite, note: 41 Am. Dec. 475; 9 L. R. A. 727; 17 L. R. A. 800; 3 C. C. A. 23; 6 U. S. App. 298; 52 Fed. 197; 135 Mass. 407; 46 Am. Rep. 481; 179 Mass. 242; 60 N. E. 81; 83 Md. 245; 34 Atl. 880; 53 Mich. 118; 18 N. W. 580; 175 N. Y. 281; 62 L. R. A. 357; 96 Am. St. Rep. 619; 67 N. E. 569; 189 Ill. 384; 52 L. R. A. 626; 82 Am. St. Rep. 460; 59 N. E. 794; 134 Mich. 591; 96 N. W. 925; 34 W. Va.

65; 9 L. R. A. 132; 26 Am. St. Rep. 913; 11 S. E. 737; 117 Ala. 413; 23 So. 68; 6 Cyc. 551; 5 Am. & Eng. Enc. Law 594; 28 Am. & Eng. Enc. Law 156; 4 Elliott R. R. 1594; 2 Hutch. Carriers 1039. *Charge on preponderance of evidence erroneous*: 82 S. C. 486; 71 S. C. 58; 121 Pac. 452; 45 Pac. 867; 36 Atl. 909; 89 Me. 441; 36 S. W. 909; 137 S. W. 568. *Number of witnesses to be considered in determining preponderance of testimony*: 154 Ill. App. 421; 82 N. E. 407; 229 Ill. 621; 132 Ill. App. 280; 147 Ill. App. 291; 132 N. Y. S. 338; 177 Fed. 970; 18 Ill. App. 404; 41 N. J. Eq. (14 Stew.) 422; 4 Atl. 781.

*Messrs. J. J. McSwain and Tillman & Mays*, for respondent, cite: 88 S. C. 421; Crim. Code, secs. 678, 672, 676; Wigmore Ev., secs. 2033, 2498, 1013, 2034.

April 21, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This was an action for damages for an alleged wrongful ejection of plaintiff, a passenger on defendant's train from Columbia to Greenville, at Chappells, S. C., on June 3, 1912. The cause was heard before Judge Shipp, and a jury, at the September term of Court for Greenwood county, 1913, and resulted in a verdict for the plaintiff for \$500. After entry of judgment, defendant appeals.

The first exception complains of alleged error in the Judge's charge in reference to the duty of the carrier when a dispute arises between the carrier and the passenger as to the right of the passenger to transportation, and is as

1 follows: "The presiding Judge erred in charging the jury that in every case of dispute between a passenger and a carrier as to his right of transportation it is the duty of the carrier to heed the reasonable explanation of the passenger and to investigate the same; that if the carrier fails to investigate, and it turns out that the passenger's explanation

was true, the ejection would be wrongful; that the ejection is only lawful where, after investigation, the passenger's explanation is shown to have been false. Specifications: (a) The duty to investigate depends upon the character of the passenger's explanation, the facts and circumstances he details; they may be, and in the case at bar they were, of such a character as to render an investigation impracticable and even impossible without serious embarrassment to the movement of the train and subsequent inconvenience to the other passengers; (b) such rule applied to the facts of this and establishing a precedent in all similar cases, would seriously embarrass the revenues of the carrier by placing it in the power of all persons so disposed to defraud the carrier and secure transportation for which they have not paid; (c) such rule applied to the facts of the case at bar, takes no account of the obstructive, obstinate, and unreasonable conduct of the passenger. The plaintiff claimed to have in his pocket at the time of the dispute a receipt from the defendant's agent in Columbia for his fare from Columbia to Greenville, which he would not produce; common honesty and fairness required him to do so and not throw upon the carrier the duty of conducting upon independent lines for itself an investigation which, under the circumstances, was impracticable and even impossible without serious embarrassment to the movement of the train and consequent inconvenience to the other passengers; (d) such rule makes the right to eject a passenger depend upon the carrier's ascertainment that the passenger's explanation was false; whereas, the carrier has a right to eject a passenger who does not present evidence of his right to ride and refuses to pay fare, when he obstinately fails or refuses to present such evidence in his possession, or where he offers an explanation which in the nature of the case cannot be investigated without serious embarrassment to the movement of the train and consequent inconvenience to the other passengers."



This exception will have to be overruled, as we think his Honor followed the law as laid down in *Smith v. Railway Co.*, 88 S. C. 421, 70 S. E. 1057, which doctrine, as laid down by the Court in that case was reaffirmed in the case of *Campbell v. Southern Railway*, 94 S. C. 95, 77 S. E. 95, and the doctrine fully established that "the rule requiring the conductor to heed the reasonable explanation of the passenger, instead of allowing him to demand the payment of the fare on pain of expulsion from the train, works less hardship, inconvenience, and expense on the carrier than the opposite rule would on the passenger, for it is generally an easy matter for the conductor to ascertain whether the explanation of the passenger is true or false, because the stations along the railroad are nearly all connected by telephone, or telegraph lines, which the agents of the company use, with little trouble, and at little or no expense. It is a serious matter to expel a passenger from a train. It subjects him to humiliation and is calculated to wound the feelings of any self-respecting passenger. Therefore the law allows punitive damages for the wrongful expulsion of a passenger and also for compelling him to pay money under threat of wrongful expulsion. *Myers v. Railway*, 64 S. C. 514, 42 S. E. 598; *Tollerson v. Railway*, 88 S. C. 7, 70 S. E. 311. Consequently the law is, that the carrier must be

allowed to resort to so harsh and extreme a measure only at the peril of being able to justify it." In

the case at bar there is no question but that the party who sold ticket to plaintiff at Columbia was the agent of the defendant, and if plaintiff called for a ticket to Greenville, and paid for it, and by reason of the negligence of defendant's agent failed to furnish him a ticket to Greenville, but gives him one to Newberry, this would not allow another agent of the company, a conductor, or ticket collector, to wrongfully expel him from the train. If he bought a ticket to Greenville and by negligence or mistake was only furnished one to Newberry, after leaving Newberry, when

called upon for further fare, it was the duty of the ticket collector to heed the reasonable explanation of the passenger. The ticket collector is not required to accept as true any plausible explanation of the passenger, but to heed the reasonable explanation and arrive at the truth as best he can by the means at his disposal, whether by use of telephone or telegraph, or statements of other witnesses, or any facts or circumstances that corroborate the explanation of the passenger, and there is a reciprocal duty on the part of the passenger to furnish to the conductor, or ticket collector, any information within his possession to substantiate his explanations and elucidate the same, or any fact or circumstance that he knows of that will throw any light on the transaction. It is the duty of both conductor or ticket collector, and passenger to discuss their differences in a calm, courteous, and polite manner, and to mutually aid each other in arriving at a conclusion by furnishing each to the other any information as to the purchase of ticket that either may know of in reference to the same. It would be well for the purchaser of a ticket, if he has the time, to examine it to see that he is getting what he called for, and if he fails to do this, in making his explanation to ticket collector, explain why. We see no error on the part of his Honor as complained of in this exception, and the exception is overruled.

The second, third and fourth exceptions complain of error on the part of his Honor in reference to the preponderance of the evidence, and challenge the correctness of the same.

We have examined his Honor's charge as a whole, 3 and find no prejudicial errors therein such as would warrant a reversal on errors in his charge. In his general charge he stated in his own language that the plaintiff was required to make out his case by the greater weight of the testimony, or if there was an even balance of testimony in jury's mind, after considering the whole case, the defendant would be entitled to a verdict, and even when he was requested by Mr. McSwain, plaintiff's counsel, after

this, to explain the meaning of preponderance of the testimony, and he did so, and afterwards requested by Mr. Dean, defendant's counsel, as to the credibility of witnesses, and did so, his charge and explanation could not have misled the jury as to their power and duty in the case, and could not be prejudicial to either side. In *Davis v. R. R.*, 75 S. C. 307, 55 S. E. 526, the Court has this to say: "It would greatly embarrass the practical administration of the law for the appellate Court in reviewing charges to the jury to become hypercritical or a stickler for the technical rules of philology in every phrase and clause and reverse verdicts for some loose expression or slight misuse of a word when the general import of the charge stated the law. Any portion of a charge to which exception is taken should be fairly construed with reference to the clear tenor and import of the whole and as an effort to explain the law of a case to men of ordinary or average education and intelligence. The average jurymen has little knowledge and less concern about fine distinctions, but generally has a desire and capacity for sufficient information to enable him to do substantial justice between the parties." His Honor left it to the jury to say, under all of the facts and circumstances of the case, whether their verdict should be for the plaintiff or defendant, and instructed them clearly that the plaintiff was required to prove his case by the greater weight or preponderance of the evidence. Exceptions overruled.

Judgment affirmed.

MR. JUSTICE FRASER, *dissenting*. I can not concur in the opinion of the majority.

If the plaintiff had refused to show his ticket, even though he had paid his fare, he would have been  
1 properly ejected. If he had on his person other convincing evidence that he had paid his fare, I do not see why he is not required to show it.

REP.]

November Term, 1913.

It seems to me that it was error to charge that the preponderance of evidence is that evidence which produces conviction. When Courts resort to preponderance of evidence, conviction is excluded. On the criminal side of the

2 Court the State must produce evidence that convinces. The defense is made out by evidence that preponderates. Evidence for the defense may, by preponderance, raise a reasonable doubt. To define preponderance as evidence that convinces, would require the defendant to produce evidence to convince and not to raise a reasonable doubt. The effect is different in the Court of Sessions, but the term "preponderance of the evidence" means the same thing in both Courts. It is true, his Honor elsewhere states the true rule, but this is stated last and much emphasized.

I think it is error to say, as an absolute proposition: "It makes no difference whether one witness testifies against twenty or twenty against one." It may make no difference, but then again it may make a very great difference. One truthful witness may be believed against any number of untruthful witnesses. If one witness of unimpeachable integrity testifies one way, and two witnesses of equally unimpeachable integrity testify to the contrary, could it be said that two would not outweigh one? Now make the number twenty to one; can it still be said that it makes no difference? A just man would say that one man was mistaken, but he would believe the twenty. The one may have an opportunity to observe that the twenty did not have; circumstances may sustain this one, but to say without qualification that numbers make no difference is, I think, error.

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FOOTNOTE—On the question of the duty of a passenger to pay fare wrongfully demanded in order to avoid expulsion, see notes in 43 L. R. A. 706, and 84 L. R. A. (N. S.) 282.

8800

## LEDFORD v. METROPOLITAN LIFE INS. CO.

(81 S. E. 497.)

## INSURANCE. LIFE POLICY. DEFENSES. EVIDENCE.

1. In an action on a life policy, evidence of decedent's attending physician that within a year prior to the date of the policy he had treated her for a rundown condition of her system, and suspected lung trouble, but never made any tuberculin test, and did not know whether she had tuberculosis or not, was insufficient to sustain a defense under a provision of the policy that no obligation was incurred unless on the date of the policy insured was in sound health, in that at that time she was afflicted with tuberculosis.
2. Where, in an action on a life policy, defendant pleaded unsound health of insured at the time the policy was issued by reason of tuberculosis, and for that reason the policy was void under a provision that no obligation was assumed thereunder unless insured was in good health at the time the policy was delivered, defendant was confined to the disability pleaded, and could not claim a forfeiture for other reasons.

Before PRINCE, J., Greenwood, March, 1913. Affirmed.

Action by Thomas V. Ledford against the Metropolitan Life Insurance Company. Judgment for plaintiff, defendant appeals. The facts are stated in opinion.

*Messrs. Elliott & Herbert, and Featherstone & McGhee, for appellant, cite: Construction of contract: Watson v. Life Ins. Co., Mun. Court City of N. Y., March 4, 1910; 59 N. Y. 387; 123 N. Y. 613; 133 N. Y. 356-364; 63 N. Y. 404; 111 Fed. 19, 29; 84 Atl. 1062; 73 N. J. L. 619; 136 Am. St. Rep. 534; 130 Am. St. Rep. 356; 122 Am. St. Rep. 413; 121 Am. St. Rep. 676; 96 Am. St. Rep. 698; 25 Am. St. Rep. 619; 53 Am. St. Rep. 757; 19 A. & E. Enc. 65; 24 Am. St. Rep. 619; 60 Am. Rep. 661; 16 Cyc. 920, 922, 919; 194 U. S. (26 L. ed.) 710; 83 S. C. 239; 77 S. C. 191; 61 S. C. 339; 3 Am. St. Rep. 634; 65 Am. St. Rep. 757, 887.*

REP.]

November Term, 1918.

*Messrs. Grier, Park & Nicholson*, for respondent, cite: *Defense plead*: 29 S. C. 580; 50 Am. Rep. 810; 28 S. C. 438-439; 77 S. C. 296.

April 21, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

This is an action on a policy of life insurance. The defendant admitted the execution of the policy. The only issues in the case grow out of the 8th paragraph of defendant's answer, which is as follows:

"8. Further answering the complaint, defendant alleges that the policy of insurance described in the complaint provides as follows: '*Provided, however, That no obligation is assumed by the company prior to the date hereof, nor unless on said date the insured is alive and in sound health;*' and this defendant is informed and believes that on the date of said policy, to wit, May 22, 1911, and for some time prior thereto the insured, Mrs. Roxie Ledford, was not in sound health, but on the contrary was suffering from tuberculosis or consumption of the lungs. The said policy further provides that said policy is void if the insured before its date has been attended by a physician for any serious disease or complaint, or had before said date any pulmonary disease, and this defendant is informed and believes that previous to the application for said policy and previous to the date of said policy the insured, Mrs. Roxie Ledford, had been attended by a physician for a serious disease; to wit, tuberculosis or consumption of the lungs, and that previous to the application for said policy and previous to the date of said policy the insured, Mrs. Roxie Ledford, had a pulmonary disease, to wit, tuberculosis or consumption of the lungs. Wherefore, the said policy described in the complaint is null and void."

The want of soundness is alleged to be "tuberculosis or consumption of the lungs." It is further alleged that the

deceased had been "treated by a physician for tuberculosis or consumption of the lungs," and this treatment, whether the disease existed or not, vitiated the policy.

The defendant asked for the direction of a verdict. This was refused by Judge Prince, who presided at the trial of the cause on Circuit. From this ruling and from the charge itself, this appeal is taken. The exceptions are null and the case can be fully understood by an immediate consideration of the exceptions.

Exception I:

"Because it is respectfully submitted, that his Honor, the presiding Judge, erred in not directing a verdict for

1 the defendant, at the close of all of the testimony, when it appeared from the undisputed testimony:

"a. That the policy sued on provides that if the insured 'has been attended by a physician for any serious disease or complaint or has had, before said date, any pulmonary disease,' that said policy shall be void. The undisputed testimony showed that the insured had been attended and treated by a physician for tuberculosis or lung trouble or consumption and that the insured died within twelve months from the issuance of the policy of said disease."

"b. That the policy sued on further provides that it is void unless at the date of its issuance 'the insured is alive and in sound health.' The undisputed testimony showed that the insured had, before said policy was taken out, been treated for consumption, of which disease she died in less than one year thereafter."

"c. That when the insured was examined by Dr. Owens, the physician for the defendant company, before the policy was issued, she stated in her written application for the insurance that she had not been treated by a physician at all, for any disease or complaint, within two years previous to that time, when the undisputed testimony showed that she had been treated by Dr. Epting for consumption or pulmonary disease within said time—the said statement being

REF.]

November Term, 1918.

absolutely false and made for the purpose of procuring the insurance and being a fraud on the company."

Dr. Epting was appellant's witness and testified as follows:

"Q. Did you or not treat her for lung trouble? A. I gave her the same treatment that I give for any other run-down condition of the system. The treatment that I gave her builds up the system. Q. Did you treat her for lung trouble? A. I gave her a general treatment for her whole system. The Court: Mr. Featherstone, you must remember the doctor is your witness. Q. I will ask you whether or not you did treat her for lung trouble and not how you treated her? A. I suspected lung trouble. Q. And you gave her a treatment for that? A. Yes, sir. Q. That was what time? A. It was between the first of February and March. I cannot be accurate about dates. I made several visits to her house to see the children. Q. Did you not also treat her for pellagra? A. That was a year afterwards. Q. That was in 1911? A. It was in February, 1912. Q. I will show you this statement here to refresh your memory from. A. That statement was made from memory, too. I do not remember all those details. It would be impossible to remember the details of every case. Q. You did suspect lung trouble and treated her for lung trouble in May, 1911? A. Yes, sir; only I don't remember exactly about the dates. Cross-examination, by Mr. Grier. Q. As I understand you simply suspected some trouble of that kind? A. That is all. I never made any tuberculine test, and I do not know whether she had it or not. Q. Could you tell she had any symptoms of that kind? A. No, sir."

Dr. Owens, the company's medical inspector, certified at the time the application for insurance was made that "personal appearance good." The plaintiff testified as follows:

"Q. What disease, if any, did she have at the time this policy was taken out? A. None that I know of. So far as I know, there was nothing wrong with her."



It is true, the plaintiff does say that the deceased had pellagra before the policy was taken out, but Dr. Epting testifies positively that pellagra developed afterwards. Dr. Epting merely suspected that the insured had lung trouble, and a mere suspicion is not enough to warrant a Court in finding as a matter of law or fact that any contract is void. Dr. Epting did not treat the insured specifically for tuberculosis or consumption of the lungs, but "I gave her a general treatment for her whole system," and that treatment was "outdoor exercise and a plenty of fresh air."

This exception is overruled.

The other exceptions are as follows and will be treated together :

"2. Because, it is respectfully submitted, that the presiding Judge erred in charging the jury as follows :

"a. In charging the jury that plaintiff was entitled to recover unless the testimony showed that the insured had tuberculosis or consumption at the time the policy was issued ; whereas, it is respectfully submitted, that he

2 should have charged the jury that plaintiff was not entitled to recover if she was not in sound health, at the time the contract for insurance was made, or if she had been treated by a physician previous to that time for tuberculosis or consumption, or if the statement she made to procure the insurance, viz. : that she had not been treated by a physician within two years before the application was made, was false."

"3. Because the Circuit Judge erred in restricting defendant's defense to the sole question as to whether or not the defendant had tuberculosis at the time the insurance was procured and in charging the jury that that was the only defense upon which the defendant could rely ; whereas, the answer of the defendant expressly pleads the provisions of the policy which avoids the same, in case the insured was not in sound health at the time the contract was made and alleged that she was not in sound health at that time ; the

answer further pleads the provisions of the policy rendering it void if insured had been attended by a physician for any serious disease or complaint or for tuberculosis or consumption previous to the issuance of the policy and alleges that she had been so attended before that time."

"4. Because the Circuit Judge erred in restricting the defense of the defendant, as before stated, to the sole issue as to whether the insured had tuberculosis at the time the insurance was procured and in not charging the jury that under the issues raised by the pleadings the plaintiff could not recover, if the statement that she made, in her application, that she had not been attended by a physician at all, for any disease or complaint, within two years previous to that time, was false. In other words, that said false statement constituted a fraud on the company, which fraud avoided the policy."

"5. Because the Circuit Judge erred in charging the defendant's first request to charge, as follows: 'If the jury believe from the evidence that the insured had been treated by a physician for tuberculosis, previous to the date of the policy, within the time specified in the policy, then plaintiff cannot recover.' And then in restricting, or amending, the said request by charging the jury as follows: 'I charge you that, gentlemen, provided, if you find that the insured had tuberculosis at the time she made her application for insurance—if you find that she had tuberculosis at that time—then the policy is null and void;' whereas, he should have charged said request as written, without modification or amendment,—it being respectfully submitted that under the terms of the policy the plaintiff could not recover if the insured had been attended by a physician before the contract was entered into, for tuberculosis, whether she actually had that disease or not."

"6. Because he erred in charging the second request of the defendant, as follows: 'If you believe from the evidence that the insured was not in sound health or was suffering from

tuberculosis at the time the policy was issued, then the plaintiff cannot recover,' and then modifying and restricting it by charging the jury that it made no difference whether the insured was in sound health or not at the time the contract was made and that unless she had tuberculosis, the policy would not be avoided."

"7. Because he erred in charging the jury that the sole question for them to consider was whether or not the insured had tuberculosis at the time the insurance was procured; whereas, he should have charged the jury, under the issues raised by the pleadings, that plaintiff was not entitled to recover."

"a. If the insured was not in sound health at that time.

"b. If she had been attended or treated by a physician for tuberculosis, or consumption, previous to that time.

"c. If the insurance was procured under the false and fraudulent statement that she had not been attended by a physician at all, for any disease or complaint, within two years previous to the time the insurance was procured."

These exceptions can not be sustained. The defense pleaded unsoundness by reason of "tuberculosis or consumption of the lungs," and that for that reason the policy was void. To that allegation the appellant was confined. The only forfeitures mentioned in pleading or in evidence were, 1st, tuberculosis or consumption of the lungs at the date of the policy.

2d. Treatment for that disease. There is no evidence that the insured had the disease at the date of the contract of insurance, or that she was treated specifically for it.

These exceptions are overruled and the judgment appealed from affirmed.

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FOOTNOTE—The question of the effect of stipulation in application or policy of life insurance that it shall not become binding unless delivered to assured while in good health is discussed in notes in 17 L. R. A. (N. S.) 1144, and 48 L. R. A. (N. S.) 725.

8802

## DAVIS v. LITTLEFIELD.

(81 S. E. 487.)

MASTER AND SERVANT. LIABILITIES FOR INJURIES TO THIRD PERSONS.  
NEW TRIAL. MISCONDUCT OF JURORS.

1. Where a resident of Chicago, whose family was temporarily established in Aiken, provided an automobile for the health and pleasure of his family, which his son had permission to use, and which such son, or one of the other sons, ran whenever their mother desired to use it, he was liable for the negligence of such son while driving the automobile for a ride for his pleasure, it not being his mother's intention to take part in the trip in any manner; and the owner, though not liable for the negligence of his son, as such, was liable for the negligence of his servant in the course of his employment.
2. In an action for personal injuries caused by a team of mules becoming frightened at an automobile and running away, the Court did not abuse its discretion in denying a new trial because one of the jurors accepted the hospitality of, and spent night in the house of, the owner of the mules, who was also suing the automobile owner for injuries to the mules sustained at the same time, where it appeared that the juror did not know of such person's interest in the suit until too late, and that the case was not discussed.

Before GAGE, J., Aiken, November, 1913. Affirmed.

Action by Alonzo Davis against A. S. Littlefield and R. S. Littlefield. From a judgment for the plaintiff against A. S. Littlefield, he appeals.

The case was stated in appellant's brief, as follows:

"Mr. A. S. Littlefield, the defendant-appellant herein, who is a resident of Chicago, rented a house in Aiken for the winter season of 1911-1912, and established his family there. Mr. Littlefield was; much of the time, in Chicago, where he was engaged in business. Mrs. Littlefield, who

FOOTNOTE—The general question of the responsibility of the owner when automobile is being used by servant or another for his own pleasure or business is treated in notes in 1 L. R. A. (N. S.) 235; 9 L. R. A. (N. S.) 1083; 14 L. R. A. (N. S.) 216; 21 L. R. A. (N. S.) 93; 26 L. R. A. (N. S.) 382; 33 L. R. A. (N. S.) 79; 37 L. R. A. (N. S.) 834, and 47 L. R. A. (N. S.) 662. And as to the liability where automobile is being used by a member of owner's family, see note in 41 L. R. A. (N. S.) 775.

was in ill health, was in Aiken during the entire winter. Mr. Randolph S. Littlefield, a son, then of the age of nineteen, was also in Aiken, and during the Christmas holidays two other sons spent their time there. Mr. Littlefield provided a Pearce Arrow automobile, as he testified, 'for the health and pleasure' of his family. Mr. Randolph Littlefield ran this car most of the time. When the other sons were in Aiken during the Christmas holidays they ran the car when they pleased. Mr. Randolph Littlefield registered the car in the office of the clerk of the Court of Aiken county, in the name of his father, A. S. Littlefield, who was the owner thereof. Randolph Littlefield had the permission of the father to use the machine for his pleasure when he saw fit; and whenever it was the desire of Mrs. Littlefield to use the machine, either Randolph Littlefield or the other sons, when they were in Aiken, would run the car for her.

"On the 13th day of February, 1912, while A. S. Littlefield, the father, was in Chicago, Randolph Littlefield, having some friends stopping at the tourist hotel in Aiken, the Park-in-the-Pines, took the car out and started to the Park-in-the-Pines to get these friends to take them to ride; no one accompanied him. His mother was at home, and it was not her intention to take part in this trip in any manner.

"While Randolph Littlefield was going to the Park-in-the-Pines to get these friends, whom he intended to take to ride, for his own personal pleasure and theirs, he encountered the plaintiff, Alonzo Davis, who was driving a pair of mules. The mules became frightened. Exactly what occurred between Davis and Randolph Littlefield is in dispute. As a result of the occurrence, the team ran away, and Davis was thrown out and alleges that he was injured. He brought suit against A. S. Littlefield and Randolph S. Littlefield, jointly, alleging, in effect, that Randolph Littlefield occupied the position of servant to his father in running the

machine, and that both father and son were responsible for his injury.

"The case was tried before Judge Gage and a jury, in November, 1913, and the jury rendered a verdict against A. S. Littlefield alone for the sum of four hundred and seventy-five dollars. After the verdict a motion for a new trial was made, both on the ground that the verdict against A. S. Littlefield was unsustainable under the facts and the law of the case, and on the ground of misconduct on the part of one of the jurors. The facts in connection with the latter ground will hereafter be stated. The motion was refused and judgment entered up, from which this appeal is taken.

"Before discussing what we conceive to be the law of this case, there are two questions which we desire to bring to the Court's attention by way of elimination.

"The alleged accident, upon which this suit is based, occurred on February 13, 1912. The legislature, on February 16, 1912, passed an act (which became law some days later, and a considerable time after the date of the accident in question) by which a party injured in this State, in an automobile accident, was given the right to attach the car which caused the injury. We desire particularly to call the Court's attention to the fact that this act does not purport, in any manner, to create a new liability or to change the existing rules of law, which we shall, hereafter, contend govern this case, but merely provides a new right of attachment in addition to the existing rights under the attachment statutes.

"Should it in any manner be contended that this statute creates or purports to create, a new liability, the facts of its passage after the date of the accident in question would dispose of this new statute as affecting the present case. We might also add that if the statute had been in existence on the 13th day of February, 1912, and should a contention be made that it purports to create a new liability, and to make the owner of the car responsible for the act of a third party,

who did not bear to the owner or relationship of servant, and from whose act the owner could not be held responsible under the existing rules of law—we would, then, submit that such a statute would be unconstitutional as arbitrarily taking property without due process of law, and as being unwarranted class legislation.

“II. Another consideration that should be eliminated to the possible contention that A. S. Littlefield is liable because he placed within the reach of his minor son an alleged dangerous instrumentality, to wit, an automobile. The proof in the case showed that the minor son, Randolph, was an expert in the running of automobiles; but this entire matter may be eliminated from the case for the very simple reason that no allegation to fit such contention appears in the complaint, and such an idea was in no manner made the test of A. S. Littlefield’s responsibility by the presiding Judge in his charge.

“After the trial had closed and the jury was considering its verdict, it came to the attention of one of counsel that one of the jurors had accepted of the hospitality and had spent the night in the house of a Mr. Weeks, who is personally prosecuting an action against Mr. A. S. Littlefield for injury to his team, which was being driven by Alonzo Davis at the time of the alleged accident, and which, the said Mr. Weeks claims, was injured in said accident. After the jury had rendered its verdict this report was confirmed, and was made the basis of a motion for a new trial. Affidavits were presented pro and con; the Court examined the juror in open Court, and then filed an order refusing the motion, which is printed in the brief and fully states the facts. The Court criticised the action of both Mr. Weeks and the juror, but on the ground that both of them swore that the case was not discussed, and in the exercise of its discretion, refused the motion.

“Upon the authority of *McGill v. Ry.*, 75 S. C. 177, 55 S. E. 216, we submit that the motion should have been granted, and that its refusal constituted abuse of discretion.

"The case above cited holds that the accepting of the hospitality of a law agent by a member of the trial jury constituted a ground upon which the verdict should be set aside, and that to fail to do so amounts to abuse of discretion. The reasoning of the Court is the basis of the motion in the present case; that the stream of justice should remain unpolluted; that the administration of the law should be pure and above any possibility of taint or criticism, and that the Courts should not only be pure, but should be above any suspicion of impurity.

"We submit that the facts adduced here are on all fours with the facts of the Lexington case. It is true that there was no proof that the case was discussed between Mr. Weeks and the juror—that could not be proven in the nature of things, and was not proven in the Lexington case—but we submit that with the question not brought closely before the Court that it will not be safe for the Court to establish the proposition that a juror, although he claims not to discuss the case is, in the future in South Carolina, at liberty, during the trial of a case, to accept the hospitality and to spend the night at the home of a party who is pecuniarily interested in the outcome of the litigation."

*Messrs. Davis & Croft and Hendersons*, for appellant, cite: *Automobiles not dangerous machines*: 59 S. E. 340; *David's Motor Vehicles*, sec. 206. *Master and servant*: *Smith v. Jordan*, 97 N. E. 761. *Parent and child*: *Jaggard* Torts 160; 20 Cyc. 1665; 36 Am. Rep. 336; 3 N. W. 199; *Smith v. Davenport*, 36 Am. St. Rep. 737; 33 Kan. 580; 97 Am. Dec. 381; 13 Kan. 348, 350. *Liability of master for acts of chauffeur*: *Berry Automobile Law* 144; *David's Motor Vehicles* 205, 206, 212, 216; 127 App. Div. (N. Y.) 580; 152 Fed. 481; 66 Atl. 525; 107 N. W. 133; 94 N. Y. Supp. 772; 93 N. E. 801. *Parent and child*: *Berry Automobiles* 141; *David's Law Motor Vehicles* 208, 210; 59 S. E. 338; 108 N. Y. Supp. 228; 103 N. W. 946; 97 N. E. 761; 60 So. Rep. 151; 75 Central Law Journal 43; 71 Atl.



296; 39 L. R. A. 224, criticised. *Misconduct of juror*: 75 S. C. 177.

*Mr. Wm. M. Smoak*, for respondent, cites: *As to master and servant*: 133 Pac. 1020. *As to misconduct of juror*: 75 S. C. 180.

April 21, 1914.

After reciting the foregoing statement of facts, the opinion of the Court was delivered by MR. JUSTICE FRASER.

There are but two questions in this case:

1st. Is A. S. Littlefield responsible under any view of the case? 2d. Was there abuse of discretion in not granting a new trial on account of misconduct on the part of a juror?

The appellant testifies as follows:

"Q. You sent it down here for the comfort of your family? A. For anyone that wanted to use it. Q.

1 Any member of your family that wanted to use it could do it? A. Yes, sir."

The sole purpose of having the car was for the pleasure of the family. The family for whose use the car was sent consisted of Mrs. Littlefield, and three sons, two of whom were college students and only in Aiken for a short time. The principal use, therefore, was for the wife and this son, Randolph, who drove the car on the day of the accident. The wife was not in good health and used the car but little and then Randolph drove. The family use, therefore, consisted mainly in Randolph's use.

The authorities cited by appellant concede that if Randolph was driving his mother, the appellant would be responsible, and the ground of responsibility would have been that in driving his mother, Randolph would have been in the performance of the appellant's business. If Randolph had employed a hired driver to take Randolph and his friends out for a pleasure ride, the responsibility of appellant would have been equally clear. The machine would have been used for its sole purpose, *i. e.*, the family pleasure. The

fact that the son drove himself did not in any way change the business for which the machine was used. The illustration used by Judge Gage was forceful, clear and accurate. The general proposition that a servant in the transaction of his master's business shall have no purpose of his own is nowhere maintained. When a master sends his servant to town on the master's business, we know of no Court that has held that if the servant is induced to go mainly because he wants to make purchases for himself, the private purpose of the servant will relieve the master from liability for the negligence of his servant in the conduct of the master's business. The parent is not liable for the negligence of the child by reason of the relation of parent and child, yet, if the child is the agent of the father, then the existence of the relation, parent and child, does not destroy the liability of the principal for the acts of the agent. So here the nonliability of the father for the acts of the son does not destroy the liability of the master for the acts of his servant done in the course of his employment.

Upon the second question:

The case cited by appellant, *McGill v. Railway*, 75 S. C. 177, 55 S. E. 216, does not sustain him. In that case the Court says:

"In the first place, the reasons for refusing to interfere with the discretion of a Circuit Judge in matters involving the purity of the jury box and the integrity of verdicts are peculiarly strong. He is in the atmosphere of the  
2 trial, and has opportunity to estimate the character and intelligence of the jurors, as well as of the person charged with improper conversation or corrupt dealings with them. He has opportunity also to consider the verdict in the light of the evidence and the sources from which the evidence comes, and determine whether the verdict has so little support as to indicate corrupt or improper influence. These and perhaps other things afford the trial Judge such superior means of coming to a just conclusion, that before

disturbing his order on such a subject, an appellate Court should require very clear evidence of abuse of discretion."

In this case the juror did not know of the interest of Mr. Weeks until too late. The showing is that he did not discuss the case. The showing also is that the Circuit Judge approved the verdict.

The judgment appealed from is affirmed.

MR. JUSTICE HYDRICK, *dissenting*. I dissent from the conclusion that appellant is liable, and concur in the disposition of the other grounds of appeal.

MR. JUSTICE GAGE did not sit in this case.

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8803

HASELDEN v. HAMER.

(81 S. E. 424.)

MORTGAGE. DEPOSIT OF TITLE DEEDS. PLEDGE OF STOCK. ACTION FOR ACCOUNTING.

1. Where a purchaser of land paid the consideration, was put in possession, and made improvements, he was the owner, and the holding of the title deeds by the vendor as security for a debt did not create a mortgage.
2. In a pledgor's action to redeem and for an accounting, the account rather than the pleadings was the basis of the judgment, since in actions for account, where defendant has all the property and accounts, plaintiff sues because he does not, and is not supposed to, know the amount due.
3. An agreement, providing for a forfeiture of pledged stock upon nonpayment of the secured debt, was void.
4. A pledgee of stock pledged to secure a debt was entitled to possession of the stock until payment of the debt or foreclosure of his lien according to law.
5. A pledgor of stock to secure a debt was the equitable owner thereof, and entitled to all credits from dividends thereon.

Before GAGE, J., Dillon, May, 1913. Modified.

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FOOTNOTE—On the question of the duty of the pledgee of corporate stock to sell at maturity of debt, see note in 8 L. R. A. (N. S.) 1199.

Action by J. D. Haselden against W. N. Hamer. From a judgment in favor of the plaintiff, defendant appeals.

*Mr. James W. Johnson*, for appellant.

*Mr. W. F. Stevenson*, also for appellant, cites: *Changing ground for relief*: 24 S. C. 165, 172. *Rights of pledgor*: 22 A. & E. Enc. of L. (2d ed.) 876-879; 16 Am. St. Rep. 679; 2 Mills Const. L. 241; 1 S. C. 445. *Rights of pledgee*: 22 A. & E. Enc. of L. (2d ed.) 885, 894; 145 U. S. 205; 16 Am. St. Rep. 667, 670; 3 L. R. A. (N. S.) 1199; 7 Metc. 407; 87 Ala. 645. *Character of action*: 43 S. C. 192. *Amendment changing character of action*: 81 S. C. 574. *Effect of admissions in pleadings*: 16 S. C. 585. *Allegata and probata*: Pomeroy Rem. & Rem. Rights, sec. 84. *Power coupled with interest*: 11 S. C. 520; 22 Ency. 906, 907. *Trover and conversion*: 72 S. C. 462, 463.

*Messrs Haynsworth & Haynsworth*, also for appellant, cite: *Readiness to perform contract*: Thomp. on Corp., sec. 2646; 4 Johns. Ch. 490; 8 Am. Dec. 606; 33 Cal. 394; 10 Am. Rep. 290; 13 N. Y. 626; 207 U. S. 278; 229 U. S. 23; 19 N. Y. 170. *Rights of pledgee*: 11 S. C. 486; 70 S. C. 432; 25 S. E. 504; 48 S. E. 191; 88 N. W. 552; 39 Atl. 437; 114 N. Y. S. 1000; 86 N. E. 777; 93 N. E. 1123. *Conversion*: 102 Am. St. Rep. 30; 54 Atl. 46.

*Messrs Willcox & Willcox* and *Henry E. Davis*, for respondent, cite: *Prayer for relief no part of cause of action*: 34 S. C. 273; 13 S. C. 439; 23 S. C. 282; 34 S. C. 289; 16 S. C. 374; 70 S. C. 107. *Conversion*: 45 S. C. 388; 2 Strob. Eq. 370. *Tender unnecessary*: 89 S. C. 426. *Amendment to conform to evidence*: 86 S. C. 98; 68 S. C. 250; 53 S. C. 315; 51 S. C. 412. *Relief appropriate*: 16 S. C. 374; 48 S. C. 175; 69 S. C. 256. *Pledge*: 31 Cyc. 787, 789. *Contract against public policy*: 31 Cyc. 863; 49 Am. Dec. 727; Story Bailments 345; 11 Peters 351. *Exercise of power to sell*: 1 Code of Laws, sec. 4105; 31 Cyc. 858;

2 Cook Corp. 476, 477, 479. *Waiver of right to redeem*: 31 Cyc. 858; 79 Fed. 522. *Pledgees duty*: 31 Cyc. 860. *Weakness of party*: 89 S. C. 352. *Delivery of deed*: 6 S. C. 124; 2 Strob. Eq. 70. *Damages*: 72 S. C. 458.

April 21, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

Mr. Haselden and Mr. Hamer agreed to exchange certain real and personal property. The transactions that grew out of their dealings are exceedingly complicated, and it took a brief of over 400 pages to tell us about it. There is much in this case, as in too many other cases, that serves no other purpose but to confuse the real issues. It is the duty, however, of a Court of last resort to read it all, and, after days of study, to weed out the irrelevant matter and simplify and clarify as best it can. There is much conflict of testimony, but it makes no difference which statement is taken to be true, the legal result is the same. For instance, if A executes to B his bond for \$1,000, secured by a mortgage of land worth \$10,000, when the bond is due A comes to B and tenders him the amount due, and B says: "I will not take it. You last week executed to me an absolute conveyance of the land for the mortgage debt, and the land is now mine"—A denies the execution of the deed. Suit is brought and scores of pages of useless testimony are taken to prove and disprove the execution of the deed. Once a mortgage always a mortgage. The transaction can be converted from a mortgage to a conveyance only by a sufficient consideration, and it must appear that the transaction was in all respects fair. If B proves the execution of his deed, under the statement made his deed is merely another mortgage be the terms never so absolute.

Mr. Haselden and Mr. Hamer executed the following paper:

*"Exhibit A.*

"Dillon, S. C., November 21st, 1904.

"Mr. J. D. Haselden, Sellers, S. C.—Dear Sir: I beg to make you the following offer for inventory of property submitted below by you for sale:

Edwards or Home tract.....	686 acres	
Haselden Grove       "       .....	400 "	
Shaffer Grove       "       .....	365 "	
Mill Creek       "       .....	1,100 "	
Wiggins Landing       "       .....	260 "	
20 lots, 50x150, in Sellers, with ginnery, machinery, scales, and houses.....		\$42,500 00
Options 460 acres Miss C. Ed- wards' land .....	\$5,000 00	
34 mules and 3 horses.....	4,000 00	
75 hogs .....	200 00	
Stock of corn and fodder.....	1,500 00	
8 cows .....	150 00	
Stock of merchandise, 80 per cent. of \$5,000.00 .....	4,000 00	
All plows and gear, 1 McCormick reaper and binder, 1 four-horse wagon, 4 two-horse wagons, 1 hayrake, all hoes, pitchforks, shovels, tools, etc.....	300 00	15,150 00

Sum total .....\$57,650 00

—and payable as follows:

190 shares Dillon cotton mill stock at par.....	\$19,000 00
Premiums .....	9,880 00
115 shares Maple cotton mill stock.....	11,500 00
Premiums and note privilege.....	3,720 00
Cash .....	10,000 00
House and lots (my dwelling on).....	3,500 00

Sum total .....\$57,650 00

"I agree to enter into contract with you for 1905 at \$1,000 per annum. Also into an agreement to share all disposition of stock in either mill share and share alike with you in case you should care to dispose of your holdings at price I had offered for mine. In other words, should I make any sale you would have the option of placing one-half the amount sold out of your number of shares. Each of us to hold possession and receive profits made to January 1st, 1905. This means any dividends declared by the mills January, 1905, are to be mine.

"Yours truly,

"WM. M. HAMER.

"Accepted and received one dollar.

"J. D. HASELDEN.

"Witness: L.-A. Tatum."

Mr. Haselden conveyed to Mr. Hamer the land valued at \$42,500. He did not deliver all the personal property, but they estimated the personal property delivered at \$6,000. Before the transfer was had Mr. Hamer discovered that Mr. Haselden was considerably in debt, and much of the indebtedness was secured by mortgages on the land. Mr. Haselden admits that Mr. Hamer paid out for him, and he gave his notes for, \$28,640.75, and that in order to secure him for this amount he agreed that Mr. Hamer should keep the mill stock as security.

There is a dispute as to the delivery of the deed from Mr. Hamer to Mr. Haselden for the Hamer home place. Mr. Haselden claims that the deed was delivered and left by him in Mr. Hamer's safe. Mr. Hamer claims  
1 that there was no delivery, but he held it to secure him for the amounts paid out by him for Mr. Haselden in addition to the mill stock. Now, if Mr. Hamer held the paper to secure his loans, then his rights in equity cannot rise higher than those of a mortgagee, and in equity Mr. Haselden was the owner. By this conveyance Mr.

Haselden had paid the consideration, was put in possession and made some improvements (the drainage). Equity treats him as the owner. The holding of the "title deeds" does not create a mortgage in this State, and the mortgage failed.

When Mr. Hamer claimed title to the house, and claimed that Mr. Haselden had forfeited all right to the mill stock pledged, and undertook to eject Mr. Haselden from the house, Mr. Haselden brought his suit to redeem and  
2 for an accounting. He asks to redeem and for a return of his securities. He says that he had turned over to Mr. Hamer all his property except the house; that Mr. Hamer had been collecting the income, and he did not know how much or what amount he owed Mr. Hamer; that Mr. Hamer was holding his stock as collateral security, and he wanted to know the amount of his debt so that he could redeem. This case was tried in the Circuit Court, which held that Mr. Hamer had converted the stock to his own use, charged him with its estimated value of the mill stock, and gave judgment against Mr. Hamer in favor of Mr. Haselden for \$18,000, the difference between the value of the stock assigned as collateral and Mr. Haselden's note. From this judgment Mr. Hamer appealed to this Court on numerous exceptions. It is not necessary to consider the exceptions separately, because the basis of settlement was wrong, and it will be necessary to restate the account. The general rule is that a plaintiff is required to state the amount of his claim, and if the defendant admits it, there is no controversy, and judgment follows. In actions for account, where the defendant has all the property and accounts, the plaintiff comes into Court because he does not, and is not supposed to, know the amount due. The account rather than the pleadings is the basis of the judgment. *Ency. of Pl. & Prac.*, vol. 1, p. 87. "The final judgment is based upon the auditor's report,



and only indirectly upon the declaration." The plaintiff is required to plead what he knows. Mr. Haselden knew that Mr. Hamer claimed a forfeiture, and that he (Hamer) was the owner of the stock. Notwithstanding this knowledge, he claims that Hamer holds his stock as collateral. The effect of that is to allege that he (Haselden) is the owner. The defendant, however, in his answer claims that the plaintiff has forfeited his right to redeem, and that he (Hamer) is now the owner. Hamer does not claim forfeiture in his evidence.

Who is the owner? The case shows that while the mill stock stood in Hamer's name, yet it was held by Hamer as security for the debt. There was a disputed agreement that provided for a forfeiture upon the nonpayment  
3 of the debt. Haselden claims the agreement was signed while he was unconscious. For all practicable purposes it makes no difference whether the agreement was executed when Haselden was conscious or unconscious. A provision for a forfeiture upon nonpayment of the debt was void. The law is well stated in 13 Cyc. 863: "The pledgee is not entitled upon the pledgor's default to take the property as his own in satisfaction of the debt. A provision in the contract by which the absolute property in the pledge is to vest in the pledgee upon default of the pledgor is void and the pledgor is still entitled to redeem. Nor can the pledgee cut off the pledgor's interest in the collateral by a mere notice that if the debt is not paid by a certain time, he will take the collateral as his own." So that as a matter of law the stock belonged to Mr. Haselden. Even if there was a conversion, Mr. Hamer is responsible for and Mr. Haselden is entitled to the real value of the mill stock, and there was no evidence of the real value.

In the Court of equity justice ought to be done. This was an exchange of property, and values were comparative merely. This is not denied. The record shows and it is

not denied that Mr. Hamer warned Mr. Haselden 4, 5 against the uncertainty of the value of mill stock.

With full warning Mr. Haselden called for and claimed the mill stock up to the time of the final hearing. It is true Mr. Hamer claimed too much, but he is entitled to that which the evidence and law gives him. He is entitled to the return of his money, which Mr. Haselden admits he owes him, and entitled to retain possession of the mill stock pledged until his debt is paid, or he forecloses his lien according to law. Mr. Haselden is the equitable owner of the stock, and entitled to all credits from dividends arising thereon and otherwise, and the case will have to be remanded to the Court of Common Pleas for Dillon county for a restatement of the account on this basis. Mr. Hamer is entitled to his debt and interest.

It is, therefore, ordered that the judgment appealed from be modified as above set forth, and the case is remanded for a restatement of accounts.

MR. JUSTICE GAGE did not sit in this case.

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8804

ELDER HARRISON CO. v. JERVEY.

(81 S. E. 501.)

INTOXICATING LIQUORS. RECOVERY OF MONEY COLLECTED. ILLEGAL TRANSACTIONS.

Where defendant's intestate, either as agent or as a principal, acting with plaintiff, sold intoxicating liquors supplied by plaintiff in violation of the laws of this State, and collected and received the purchase price therefor, plaintiff could not sue for the balance of the amount so collected, after deducting credits due the intestate, since the test of recovery in such cases is whether there is a legal obligation in favor of the plaintiff separate from the illegal transaction, and requiring no aid from it, and the obligation of the estate could not be separated from the sales by the intestate; the debt resting upon such sales and the account arising therefrom.

Before SHIPP, J., Charleston, June, 1913. Reversed.

Action by the Elder Harrison Company against Theodore D. Jervey, administrator of C. H. Jervey, deceased. From a judgment for plaintiff, defendant appeals.

*Mr. Theodore D. Jervey, administrator, in pro. per. appellant, cites: The matter arises on demurrer to the allegations: 27 S. C. 107-110; 16 S. C. 540; 21 S. E. 540; 35 S. E. 759-761; 42 S. E. 197; 69 S. E. 292; 41 S. E. 974; 70 S. E. 1038. In the accounting the whole case must be taken together, and upon that plaintiff cannot recover: 6 Term Rep. 405-408; 19 U. S. Sup. Ct. Reporter, 846; 7 Wall. (U. S.) 558. Recovery would enforce division of profits on an illegal transaction: 30 N. J. Eq. 257; 16 Miss. 264; 71 S. E. 920; 19 Sup. Ct. Rep. 851; 117 Pac. 1086; 3 Kent 25; 1 Hill 37. Agency in illegal transactions: Story Agency, pp. 231, 279, 422; 7 Wall. (U. S.) 542-558. Defendant's possession arises from law: 1 Code of Laws, sec. 3610. Obligation to the public: 1 Code of Laws, sec. 3632. Public policy: 31 S. E. 334; Crim. Code, secs. 829, 794; 78 S. E. 641; Anderson v. Moncrieff, admr., 3 deS. 124; Tennett v. Elliott, 1 Bos. & Puller 3, and Farmer v. Russell, 1 Ib. 298, distinguished; Carson v. Rembert, 2 Bay 506, overruled by Mordecai v. Dawkins, 9 Rich. 262.*

*Mr. Paul M. McMillan, for respondent, cites: Agent cannot question legality of transaction: 3 deS. 124; 28 S. C. 465; 53 S. C. 179; 1 Bailey 315; 18 How. (U. S.) 293; 16 Wall. 499.*

April 21, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

One C. H. Jervey, now dead, sold liquor to sundry persons in the city of Charleston, and collected the proceeds thereof.

REF.]

November Term, 1918.

The sale was in violation of the letter of the State law. The Elder Harrison Company supplied the liquor from the State of Maryland. Jervy was not faithful to his trust; he kept some \$400 of the money he collected. The Elder Harrison Company sued Jervy's estate therefor. The administrator pleads that a Court ought not to entertain the suit. That is the issue. The Court below overruled the plea, and sustained the action, and the administrator appeals to this Court.

There was some contention at the bar about whether Jervy acted as the agent for the Elder Harrison Company, or whether he acted as a principal with that company in the sale of liquor; each party doing that which he could to further the unlawful enterprise.

The pleadings put in issue the strict matter of agency, and the stipulation of counsel has not settled it; and, although the Court below found that Jervy was the "soliciting agent of the plaintiff," such a conclusion was not warranted from the pleadings or the stipulation. The fact is the transaction was accomplished as the exigencies of the case demand; the company shipped the liquor to Charleston, and Jervy sold it for the company, collected the proceeds, and remitted the same to the company. Jervy, therefore, might be called agent for the company, or a principal acting along with the company; each doing his part towards the venture. It matters little what the relationship is called when the real transaction is understood. A consideration of cases from other jurisdictions than this State would not be helpful, but the contrary. In this State even, the cases are in apparent, if not real, disarray. It would be an idle task to review them, to explain them, or to attempt to reconcile them; they speak for themselves, and their voice cannot now be changed, and its authority preserved. The cases run from *Anderson v. Moncrieff*, in 3 deSaus. 124, to *Rountree v. Ingle*, in 94 S. C. 236, 77 S. E. 931, 45 L. R. A. (N. S.)

776. Some things are plain in the cases, and some things are obscure; it is always so.

It will not be denied by anybody that, if the Elder Harrison Company had sued, for the price, a purchaser of its liquor in Charleston, the plea by the purchaser that the sale was unlawful would have defeated the action. It is reasonably settled that, if the Elder Harrison Company had sold liquor to a man in Charleston, and the purchaser had paid the price to a bank at Charleston as collector, the bank could not avoid payment to the vendor on the plea that the sale was unlawful. The case at bar is betwixt those stated.

In the case at bar Jervey not only "collected and received" the purchase price of the liquor (complaint), but his duties consisted, also, in "soliciting sales and selling intoxicating liquors" (answer). And the fund in Jervey's hands is the aggregate of an account, "after deducting all credits due Jervey" (complaint, fourth paragraph).

Before it can be ascertained how much Jervey's estate is due to the Elder Harrison Company, inquiry must be had, and it must then appear by the evidence that Jervey sold liquor to ten persons, that he was entitled to keep certain credits for himself, and that a balance of some \$400 is due to the Elder Harrison Company. In a word, Jervey's estate must make up an account, already stated in the complaint, and that account tells the tale of wrongdoing.

"The long-settled test of recovery, namely, whether there is a legal obligation in favor of the plaintiff against the defendant *separate* from the illegal transaction, and requiring no aid from it." Such is the latest and most satisfactory rule laid down in this State. *Rountree v. Ingle*, 94 S. C. 236, 77 S. E. 931, 45 L. R. A. (N. S.) 776.

The obligation of the estate of Jervey to pay cannot be separated from ten sales of liquor made by Jervey for the Elder Harrison Company; the debt rests upon those sales and the account arising thereout. The suit is upon an

REP.]

November Term, 1918.

account, and the items of the account must be proved. This conclusion is contrary to that reached by the Court below.

The judgment of the Circuit Court is reversed, and the complaint is dismissed.

MR. CHIEF JUSTICE GARY and MR. JUSTICE FRASER concur.

MESSRS. JUSTICES HYDRICK and WATTS dissent.

8805

## RAWLS v. AMERICAN CENTRAL INS. CO.

(81 S. E. 505.)

## INSURANCE. FORFEITURE CLAUSE. FIXTURES. MORTGAGES. RIGHTS OF MORTGAGEES AND ASSIGNEE.

1. Within the clause of a fire policy providing for a forfeiture, "if the subject of insurance be personal property, and becomes incumbered by a chattel mortgage," there is no forfeiture because of a mortgage on land, "with all improvements thereon situate," if the insured property on the land is a fixture.
2. Unless the facts are susceptible of but one inference, there is a question of fact as to whether a structure on land is a fixture.
3. The assignment, "For value received, I hereby transfer all my rights and title to the within note and mortgage, \* \* \* without recourse," is sufficient in form to transfer the assignor's interest as mortgagee in the insurance on the mortgaged property.
4. The consideration in an assignment being stated to be "value received," parol evidence is admissible to show the true consideration.
5. A mortgagee's interest being insured, the insurer on paying his claim is entitled to subrogation to the mortgagee's rights under the mortgage.
6. The insurer having canceled the insurance and returned the premium to the owner of the property, without notice to the mortgagee, whose interest was insured, the mortgagee, recovering of the insurer on a loss occurring, is not required to return to the insurer the premium which it returned to the property owner.

FOOTNOTE—As to the right of an insurer to subrogation to mortgage on payment of mortgage debt from proceeds of insurance on mortgagee's interest, see note in 8 L. R. A. (N. S.) 79.

## Exceptions.

[97 S. C.]

7. The complaint merely alleging damage in the sum of \$1,000, and praying judgment for that sum, plaintiff cannot recover interest from the time the claim became payable, and so make the recovery more than \$1,000.

Before GAGE, J., Aiken, October, 1913. Affirmed.

Action by W. L. Rawls against the American Central Insurance Company. Judgment for plaintiff, defendant appeals. This is the second appeal in this action, the first appeal being reported in 94 S. C. 299, 77 S. E. 1013, 45 L. R. A. (N. S.) 463.

## EXCEPTIONS.

Defendant's exceptions are:

"1. The Court erred in allowing testimony as to what passed between the agent and Mr. Rawls at the issuance of the policy, on the ground that the policy, in law, expressed the terms of the contract between the parties and such testimony tended to vary its terms.

"2. The Court erred in allowing Mr. Rawls and H. M. Sawyer testify as to assigning or not his claim against the insurance company, over the objection of defendant's counsel, on the ground that the assignment is in writing, and expresses the contract between the parties, and in permitting said witnesses to testify that a claim against the insurance company was reserved, and as to any understanding between said witnesses and H. M. Sawyer, as to reserving such claim against the company, the contract between the parties was varied.

"3. The Court erred in allowing Mr. Rawls to testify in regard to whom and how the premium was paid, on the ground that the policy expresses the terms of the contract, and such testimony tended to vary the same.

"4. The Court erred in permitting Mr. Rawls and H. M. Sawyer to testify that they had a private understanding and arrangement with each other whereby the mortgages could be returned to Mr. Rawls in the event the insurance

company paid up the loss, in order to subrogate the company to his rights.

"5. The Court erred in not granting defendant's motion for a nonsuit at the conclusion of plaintiff's testimony, on the ground that the testimony showed that plaintiff owned no interest whatever in the property, mortgages or insurance policy at the time the action was commenced.

"6. The Court erred in permitting the question and answer to and by Mr. Dan H. Sawyer, as to what the Dicks mortgage covered, on the ground that the mortgage speaks for itself, and the Court should have so held and charged.

"7. The Court erred in not granting defendant's motion for a nonsuit at the conclusion of all the testimony in the case, for the reason that the testimony shows, so that no other inference could be drawn therefrom, that the plaintiff owned no interest in the mortgages or in the policy of insurance, and had no claim against the company at the time the action was commenced; further, that a mortgage existed over the property (the Dicks mortgage) which was unknown and not consented to by the company, and which, according to the clear provisions of the policy, produced a forfeiture.

"8. The Court erred in charging plaintiff's second request, and in not holding that, under the testimony and the law of the case, the assignments covered all of plaintiff's interests, and that it was not a question for a jury, or a question of fact, as to whether plaintiff retained an interest, insurable or otherwise.

"9. The Court erred in charging plaintiff's third request.

"10. The Court erred in charging plaintiff's fifth request, because the claim was not adjudicated or liquidated, but was denied, and cannot bear interest until properly adjudicated; and in modifying defendant's seventh request by adding the words, 'and interest accrued from time of loss.'

"11. The Court erred in charging plaintiff's fifth request, because the Court should have construed the said 'Dicks'



mortgage to be one covering the personal property insured, as it, in fact, did and was intended to do, and should not have left it to the jury to say what sort of a mortgage it was, or whether it covered personal property or not.

"12. The Court erred in charging the plaintiff's eighth and ninth requests, and in not holding that in this case the question was not one to be submitted to the jury; the facts being susceptible of only one inference, and that being against the contention of the plaintiff, and in favor of the contention of the defendant.

"13. The Court erred in modifying defendant's eighth request, and seventh request, and sixth request; in refusing to charge the defendant's ninth, tenth, eleventh and twelfth requests, as follows:

"Ninth request: 'I charge you that the assignment of a mortgage in general terms transfers all of the assignor's rights thereunder. 1 Jones on Mortgages, 829; Burrell on Assignments, 354.'

"Tenth request: 'You are charged that the mortgage by J. J. Jeffcoat to A. F. Dicks, dated December 4, 1909, and containing in its description the following: "With all improvements thereon"—means all of the improvements thereon existing at the time the mortgage was given, which includes the sawmill, planer, lathe, buildings, and any other property there; and, if you find that this mortgage existed on said property at the time of the issuance of the policy, and that Mr. Dan Sawyer, the agent, had no knowledge of the said Dicks mortgage, the existence of said mortgage amounted to a forfeiture of the policy, and the plaintiff cannot recover.'

"Eleventh request: 'You are charged that, if the said Dicks mortgage was concealed from the agent, this amounts to a concealment of a material fact under the policy, and the plaintiff cannot recover.'

"Twelfth request: 'That any alleged agreement, by parol, existing between H. M. Sawyer and W. L. Rawls to

REP.]

November Term, 1918.

sell back to Rawls the mortgages in question cannot be valid and binding, unless the agreement is to be carried out within a year, and unless the agreement is in writing, or some memorandum made thereof.'

"14. The Court erred in not granting defendant's motion for a new trial based upon the following grounds, which were presented to the Court in presenting said motion:

"(1) The Court erred in admitting testimony as to alleged conversation at the time of the issuance of the policy between Rawls, Jeffcoat, and the agent of the company, in that said testimony tended to contradict and vary the terms of the written contract which was made at that time, and which was in evidence, which ruling was prejudicial to this defendant.

"(2) The Court erred in admitting evidence as to premium being paid indirectly by Rawls, in that said testimony varied the terms of the contract, which was in evidence to this defendant's prejudice.

"(3) The Court erred in permitting plaintiff to introduce testimony tending to show a parol agreement between Rawls and H. M. Sawyer to the effect that he could regain the mortgages at any time by paying said Sawyer the \$100 consideration given for the written assignment of the mortgages, the said testimony varying and contradicting the terms of the assignment, and also on the ground that said alleged parol agreement was an unlawful agreement according to law, could not be enforced, and was prejudicial to this defendant in this cause.

"(4) The Court erred in holding that, after plaintiff had assigned his mortgages to H. M. Sawyer, he still had an interest in the insurance contract which amounted to a chose in action, and which was sufficient to support this cause against the defendant; the ruling being prejudicial to this defendant.

"(5) The Court erred in overruling the various other objections interposed by defendant to admission of testimony, as shown by the exceptions in the record noted by defendant's counsel.

"(6) The Court erred in not granting the motion of defendant for a nonsuit on the grounds noted in the record.

"(7) The Court erred in refusing the several requests of the defendant to charge the jury; the same containing sound legal propositions and applicable to the case—this defendant being prejudiced thereby.

"(8) The Court erred, especially, in refusing to construe the 'Dicks' mortgage as contended for by defendant, and in leaving it to the jury to say whether the mortgage pertained to realty or to personalty.

"(9) The Court erred in instructing the jury that it might give a verdict amounting to more than \$1,000 stated in the policy of insurance, being interest in amount to over \$100 additional.

"(10) The Court erred in not granting defendant's motion for a nonsuit, or in not directing a verdict, at the conclusion of the whole testimony, as requested by defendant.

"(11) In the event the Court determines not to grant a new trial on the grounds above set forth, the defendant asks that the Court direct a reduction from the amount of the verdict of the amount above \$1,000; also, the sum of \$100 being premium returned by the company when the policy was cancelled, and the sum of \$100 obtained by Rawls from H. M. Sawyer, the consideration for the assignment of the said mortgages.

"15. The Court erred in not setting aside the verdict of the jury in the case, on the ground that the testimony showed that the said verdict was against the greater weight of the testimony, and prejudicial to the defendant's interests in this cause."

## STATEMENT OF FACTS.

This is an action on a policy of fire insurance. On a former appeal herein, the sole question determined was that the plaintiff, as mortgagee, was entitled to notice of cancellation. 94 S. C. 299, 77 S. E. 1013, 45 L. R. A. (N. S.) 463.

The complaint alleges:

"That on the 1st day of July, 1911, upon the application of J. J. Jeffcoat and W. L. Rawl, the defendant company issued to J. J. Jeffcoat and W. L. Rawl its policy of insurance by which it was insured in the sum of \$1,000 against loss by fire the following property of the said J. J. Jeffcoat, to wit: \$300 on his frame building; \$150 on his sawmill; \$300 on his planer, and \$250 on his turning lathe.

"That each of the above stated items of property was incumbered by mortgages in plaintiff's favor for larger sums than the insurance issued upon each of said items of property.

"That on the 28th day of July, 1911, all the above listed property was totally destroyed by fire, and, as a result thereof, the plaintiff has lost his security upon his mortgages, and has been damaged to the extent of \$300 in the loss of the frame building, \$150 in the loss of the said sawmill, \$300 in the loss of the said planer, and \$250 in the loss of the said turning lathe; the remaining property covered by plaintiff's mortgages being totally insufficient to pay them.

"That there was incorporated in said policy, for the express purpose of protecting and insuring this plaintiff as mortgagee, the following clause: 'Loss, if any, payable to Mr. W. L. Rawl, of Batesburg, S. C., as his interest may appear, subject, nevertheless, to all the conditions of this policy.' And in addition thereto said policy provided: 'This policy shall be cancelled at any time, at the request of the insured, or by the company, by giving five days' notice

of such cancellation.' And, further, the said policy provided: 'If, with the consent of this company, an interest under this policy should exist in favor of a mortgagee, or any person or corporation having an interest in the subject of insurance, other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.'

"That on July 20, 1911, the defendant company notified J. J. Jeffcoat of its election to cancel the policy, took the same up from the said Jeffcoat, repaid him the unearned portion of the premiums, and took a cancellation receipt therefor, but at the said time gave no notice whatsoever thereof to this plaintiff, but that only on the day of the fire a verbal notice of the fact that said attempted and abortive cancellation had been made was given to the plaintiff. That he has been damaged by the destruction of the property so insured in the sum of \$1,000."

The defendant's answer to the complaint is as follows:

"For a first defense:

"(1) It denies each and every allegation in said complaint contained, except such as hereinafter specifically admitted, and demands strict proof thereof.

"For a second defense:

"(1) That, at the time the policy alleged in the complaint was issued, it contained stipulations and conditions which were a part thereof, as follows: 'This entire policy shall be void, if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated therein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, whether before or after loss.'

REP.]

November Term, 1918.

“(2) That, at the time said policy was issued, defendant’s agent, Mr. Dan H. Sawyer, asked the insured what incumbrances were over the property covered by the policy, and the insured advised him then and there that there were no incumbrances over the same, except those to the plaintiff, as set out in the policy, and absolutely failed to advise him of other incumbrances that were then over the said property, thereby misrepresenting and concealing material facts and circumstances concerning the subject of the said insurance, but for which the defendant, its agent and servant, would not have issued said policy, and which said misrepresentations and concealments rendered the same null and void, and it was never of force and effect.

“For a third defense:

“(1) That the said policy contained, when issued, the condition, ‘if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage, or if any change, other than the death of an insured, take place in the interest, title, or possession of the subject of insurance,’ etc., the entire policy, unless otherwise provided by agreement, endorsed thereon, or added thereto, shall be void.

“(2) That at the time said property was insured, there were both real estate mortgages and chattel mortgages over the subject of this insurance, other than the mortgages indorsed upon the policy, to which the defendant never agreed, indorsed upon the policy, nor knew of, and the existence of which rendered said policy void, and the same was never of force and effect.

“For a fourth defense:

“(1) That, under the terms of said policy, and the riders attached thereto, the plaintiff, in the event of loss, can only recover as his interest may appear.

“(2) That, if the plaintiff ever had an interest in the subject of said insurance, it was only as mortgagee, and he has since the insurance of the same sold his mortgages, and

no longer has any interest whatever in the property, and has no claim against this defendant for damages, either in law or equity.

“For a fifth defense:

“(1) That, if the plaintiff is entitled to recover under said policy, as alleged in the complaint, upon the payment to him of damages provided by said policy, this defendant would be subrogated to all of the rights, privileges and interests held by the plaintiff under the mortgages through which he claims an interest in the subject hereof at the time of the fire.

“For a sixth defense:

“(1) That, when this defendant, its agent and servant, canceled and took up the policy herein, it returned to J. J. Jeffcoat, the insured, the premium he had paid, \$100, and that, if the plaintiff is entitled to recover, as alleged in his complaint, this defendant should be allowed to deduct the amount of the premium so returned from the amount for which it is liable under said policy. Wherefore the defendant demands that the complaint be dismissed with costs.”

*Messrs. Gunter & Gyles, for appellant, cite: Plaintiff parted with all interest under policy upon assignment of note and mortgage to his assignee: 27 Cyc. 1296-9; 1307, 1315; 6 Rich. Eq. 302; 60 Am. St. Rep. 322; 52 Me. 128; 27 Cyc. 1308, 1318; 14 S. C. 66; Jones Mtges. pp. 420 & 691, secs. 322 & 829; 5 S. C. 346; 10 Rich. Eq. 582; 83 Am. Dec. 296; 2 Cyc. 1087; 9 Wend. 80; 4 Johns. 41; 85 Ala. 80; 9 Cowen 747; 17 How. (U. S.) 612; 11 Am. Dec. 417; 64 Ib. 551; 100 Ib. 469; 1 Wheaton 279; 6 Am. Rep. 82; 50 Am. Rep. 475; 11 Rich. 432; 4 S. C. 23; 2 May Ins., p. 1040, sec. 456; 4 Cyc. 68; 138 Mass. 11; 4 Cyc. 74, 85; 32 S. C. 215; 32 Ill. 221; 107 Mass. 377; 77 S. C. 191, 229. Insurer subrogated to rights of mortgagee: 76 S. C. 101; 36 S. C. 267; 76 S. C. 101. Admissibility of evidence as to property covered by mortgage: 42*

REP.]

November Term, 1918.

S. C. 66; 93 Ill. 415; 27 Cyc. 1093; Jones on Ev., sec. 175. *Construction to be made by the Court*: 31 S. C. 398; 32 S. C. 123; 34 S. C. 217. *Fixtures*: 51 S. C. 29; 3 Words & Phrases 2841. *Relief to be granted limited by prayer of complaint*: 77 S. C. 107; 23 Cyc. 796; 19 S. C. 499; 37 S. C. 157.

*Messrs. Hendersons*, for respondent, cite: *As to effect of assigning the mortgages*: Richards Ins., secs. 44 and 45; 268; 19 Cyc. 591; 13 A. & E. Enc. of L. 138, 199; 80 Am. Dec. 578; 21 Enc., p. 1093. *Right of subrogation does not impair rights of mortgagee to collect his debt in full*: Richards Ins., sec. 53; 37 Cyc. 379; 51 Am. St. Rep. 766; 1 Leading Cas. Eq. 120; 6 Watts 221; 10 Watts 148; 52 Pa. St. 522; 19 Weekly Notes Cases (Pa.) 78; 112 Fed. 203; 17 Am. St. Rep. 102; 103 U. S. 25. *Construction of clause as to forfeiture; real estate mortgage*: 39 Atl. 868; 56 N. J. Eq. 309; 35 Ky. (5 Dana) 542, 547; 67 Pa. (17 P. Smith) 512-19; 28 Atl. 180, 181; 159 Pa. 388; 31 N. C. 91, 93; 81 Mo. 264, 270; 45 Mo. 100, 102. *Inclusion of interest in verdict*: 19 Cyc. 971; 13 Enc. 370; 16 Am. Dec. 322; 27 Am. St. Rep. 708; 3 Fed. 197. *Prayer no part of complaint*: 85 S. C. 192.

April 21, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

We will first discuss the defenses in regular order.

(The first defense is a mere denial.)

Second defense: The only testimony introduced to sustain this defense was to the effect that J. J. Jeffcoat executed a mortgage in favor of A. F. Dicks, dated 4th December, 1909, on the lot of land described in the complaint, and that the defendant had no notice of said mortgage at the time the policy was issued.



His Honor, the presiding Judge, upon the request of the defendant, charged the jury as follows: "That if you find that Mr. Jeffcoat concealed or misrepresented any material fact or circumstance concerning the insurance, or the subject thereof, then Mr. Rawl is bound by such concealment or misrepresentation, and he cannot recover from the company."

It will thus be seen that the verdict of the jury disposed of this defense.

Third defense: The mortgage in favor of A. D.

1, 2 Dicks covered the said land, "with all improvements thereon situate."

His Honor, the Circuit Judge, charged the sixth and eighth requests of the plaintiff, which were as follows:

(6) ~~The jury is charged~~ that the forfeiture clause in the policy, which has been introduced in evidence, based upon the existence of mortgages upon insured property, provides for a forfeiture, 'if the subject of insurance be personal property, and be or becomes incumbered by a chattel mortgage.' The jury is charged that under this forfeiture clause that the existence of a real estate mortgage upon the property does not of itself work a forfeiture of the insurance."

"(8) If the jury finds that the articles in question savor of realty, being guided by all the testimony that they have heard upon the witness stand, and were incumbered by a real estate mortgage, then the jury is charged that the existence of said real estate mortgage does not work a forfeiture of the policy of insurance."

The question whether the words "all improvements thereon situate" embraced the property covered by the mortgage executed by Jeffcoat in favor of the plaintiff depended upon the fact whether it was to be regarded as real or personal property.

In the case of *Padgett v. Cleveland*, 33 S. C. 339, 11 S. E. 1069, this Court recognized the following as a correct

definition of a fixture: "A fixture is an article which was a chattel, but, by being physically annexed to the realty by one having an interest in the soil, becomes a part and parcel of it." Mr. Justice McGowan, who delivered the opinion of the Court in that case, uses this language: "We think \* \* \* the general statement may be safely made that in the later cases there has been a decided relaxation as to the original rule of the common law \* \* \* governing the freehold, and that this modern relaxation has been effected chiefly in favor of trade. \* \* \* Besides this confusion in the law \* \* \* and whether an article of personal property has been so annexed to the soil as to make it a permanent fixture, and as such not movable, is always a mixed question of law and fact."

In *Hughes v. Shingle Co.*, 51 S. C. 1, 28 S. E. 2, the Court quotes with approval the following statement of the rule: "Where a structure is placed upon land, not to promote the convenient use of the land, but to be used for some temporary purpose, external to the land, and the land is used only as a foundation, because some foundation is necessary for the business, then the structure and its belongings are not fixtures."

These authorities are quoted with approval in the case of *Hurst v. Craig Furniture Co.*, 95 S. C. 221, 78 S. E. 960, which concludes as follows: "The great confusion in regard to the law of fixtures has arisen from the effort to construe that as a fixture in one case because it was so regarded in other cases. A fixture involves a mixed question of law and fact. It is incumbent on the Court to define a fixture; but whether it is such in a particular instance depends upon the facts of that case, unless the facts are susceptible of but one inference. In modern times the question whether the article is to be regarded as a fixture depends generally upon the intention of the parties in the particular case."

These cases show that the question whether the articles described in the Dicks mortgage were to be regarded as real or personal property was properly submitted to the jury.

Fourth defense: The proposition for which the appellant's attorneys contend is thus stated in their argument: "That when Rawl, the mortgagee, assigned by absolute assignment, without recourse, his interest in the 3, 4 notes and mortgages to H. M. Sawyer, he parted with all his interests, if he had any interest at all, or claim against the insurance company, and that any such interest, thereby became extinguished."

The first question that will be considered is whether the assignment upon its face, or in the absence of other testimony, was sufficient to transfer to the assignee the claim of the plaintiff, which arose under the policy of insurance.

The rule is thus stated in 27 Cyc. 1298, 1299: "A formal and valid assignment of a mortgage and debt which it secures will generally invest the assignee with all the rights, powers and equities possessed by the mortgagee, including the benefit of any collateral undertaking, obligations, or security, which constitutes a part of the mortgage security, any covenant to pay the mortgage debt, any right which the mortgagees may have as to receiving the rents and profits, any benefit from existing insurance, or the proceeds of the policies; as also the benefit of any entry or possession on the part of the mortgagee any right or priority possessed by the mortgagee and the right in equity to have it reformed by the correction of a mistake or omission.

The general principle is thus announced in 2 Enc. of Law 1084: "By a complete assignment of a chose in action, the whole interest of the assignor, in the thing assigned, passes to the assignee, and also the security for the debt, for it is a familiar and well settled rule of law that the assignment of a debt carries with it every remedy and security for such debt available by the assignor as

REP.]

November Term, 1918.

incident thereto, although they are not specially named in the instrument of assignment.”

This doctrine is recognized by the other cases cited in the argument of the appellant's attorneys, including the following cases from this State: *Wright v. Eaves*, 10 Rich. Eq. 382; *Muller v. Wadlington*, 5 S. C. 342; *Lynch v. Hancock*, 14 S. C. 66; *Wilson & Co. v. Dean*, 21 S. C. 327. These authorities show that the assignment was sufficient in form to transfer the insurance claim to the assignee, and that it was not thereby extinguished.

The next question that will be determined is whether the consideration upon which the assignment was made could be shown by parol testimony.

The form of the assignments was as follows: “For value received, I hereby transfer all of my rights and title to the within note and mortgage, \* \* \* without recourse.”

It will be observed that the only consideration stated in the assignment was “for value received.”

“The rule that the written agreement is conclusively presumed to contain the whole contract, and that it cannot be shown by parol that other things were agreed on at the same time, is not applicable to instruments which, from their very nature, do not purport to state the entire agreement in respect to the subject matter, but are adapted merely to transfer title in execution of an agreement which they do not profess to show. Of this class of instruments are assignments of choses in action, bills of sale. \* \* \*” 21 Ency. of Law 1093.

The following cases in this State show that, when the consideration is stated to be for “value received,” or the writing does not purport to state the consideration in full, parol evidence is admissible to show the true consideration. *McGrath & Byrum v. Barnes*, 13 S. C. 328, 36 Am. Rep. 687; *Chemical Co. v. Moore*, 61 S. C. 166, 39 S. E. 346; *Williams v. Salmond*, 79 S. C. 459, 61 S. E. 79; *Holliday v. Pegram*, 89 S. C. 73, 71 S. E. 367, Ann. Cas. 1913A, 33.

Fifth defense: There is no doubt as to the proposition contained in this defense; but the right of subrogation does not arise until the claim is paid. The plaintiff does not dispute this right, nor was it in his power to deprive  
5 the defendant thereof, when the notes and mortgages were assigned. It is a right that arises by operation of law, and any one to whom property is assigned takes it subject to the right of subrogation, if the property in the hands of the assignor would have been subject to such right.

Sixth defense: In regard to this proposition, it is only necessary to say that the policy was not canceled as to the plaintiff, and, if the defendant did not see fit to give  
6 him proper notice of cancellation, there is no just reason why he should be required to return the unearned premium, paid to Jeffcoat.

The foregoing are the only defenses upon which the defendant relied.

These conclusions practically dispose of all questions properly before the Court for consideration, except  
7 one, to wit: Was there error on the part of his Honor, the presiding Judge, in charging the jury that they could find a verdict for the interest?

The policy provides that the insurance shall not fall due until the expiration of 60 days after the filing of proper proofs of loss. The jury, under a charge of the Circuit Judge, rendered a verdict in favor of the plaintiff for \$1,130.66, which included interest after the expiration of 60 days from the time of filing proofs of loss.

The complaint alleges that the plaintiff "has been damaged by the destruction of the property so insured in the sum of \$1,000, and the prayer is for judgment for the sum of \$1,000 and the costs and disbursements of the action.

The case of *Straub v. Screven*, 19 S. C. 445, shows that the plaintiff could not recover a larger amount than

REP.]

November Term, 1918.

that for which he demanded judgment, and therefore that the ruling was erroneous.

As the amount of interest allowed is certain, it will not be necessary to remand the case for a new trial, unless the plaintiff should refuse to remit the interest.

It is the judgment of this Court that the judgment of the Circuit Court be reversed, unless the plaintiff shall remit upon the record the amount included as interest within 10 days after the remittitur shall have gone down, but that, if said amount is remitted, the judgment shall stand affirmed.

MR. JUSTICE FRASER, *dissenting*. I cannot concur. When Rawl assigned the notes and mortgages, he assigned his interest in the policy. The Rawl interest went to Sawyer, along with the notes and mortgages. I do not see how Rawl can recover on the policy any more than he can recover on the notes and mortgages.

MR. JUSTICE GAGE did not sit in this case.

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8806

JOHNSON v. ROAD & HIGHWAY COMMISSION FOR MARION COUNTY.

(81 S. E. 502.)

HIGHWAYS. EMINENT DOMAIN. CONDEMNATION. POWERS OF COMMISSION. INJUNCTION. ISSUES. STATUTES. SUBJECT AND TITLE.

1. Under Laws 1910, p. 948, sec. 7, empowering the Commission, provided for improving roads of Marion county, to condemn, "provided, that where lands are condemned, the damage shall be fixed as now provided by law," the damages are to be fixed by the county board as theretofore.
2. Whether the commission for improving roads in Marion county is proceeding to build a new road or relocate an old road is immaterial; Laws 1910, p. 948, secs. 5, 7, empowering it to do both.

3. The action being merely to enjoin the commission of Marion county from opening a new road, the purpose or right of the commission to abandon part of an old road is not before the Court.
4. The act (Acts 1910, p. 945), entitled "An act to authorize the county of Marion to issue bonds for permanent road and highway improvements, and to provide for the expenditure of the same," providing for improvement of public highways in the county, has but a single purpose, sufficiently set forth in the title within Const., art. 3, sec. 17.

Before SPAIN, J., Marion, September, 1913. Reversed.

Action by Loulie V. Johnson against Road and Highway Commission for Marion county. From an order dissolving a temporary injunction, plaintiff appeals.

*Mr. James W. Johnson*, for the appellant, cites: *The statute* (26 Stats. 945) *is to be strictly construed*: 26 Am. & Eng. Enc. L. 665; 73 S. C. 89; 1 Bay 356; 139 Ill. 46; 32 Am. St. Rep. 179, and note. *How damages are to be fixed or assessed*: 1 Code of Laws 1933. *Relocation of road*: 37 Cyc. 175; 189 Mass. 308; 19 Am. & Eng. 515. *Jurisdiction of Judge at chambers*: 54 S. C. 487; 62 S. C. 196; 63 S. C. 348; 67 S. C. 84; 69 S. C. 156; 77 S. C. 81. *The allegations of complaint only to be considered*: 68 S. C. 332; 59 S. C. 256; 80 S. C. 434. *New roads*: 60 S. C. 78; 1 Rich. L. 335; 11 Rich. L. 485. *Title and subject matter of act*: 75 S. C. 560; 80 S. C. 127; 68 S. C. 148; 91 S. C. 454; 91 S. C. 447.

*Messrs. W. F. Stackhouse and L. D. Lide*, for respondent, cite: *Relocating a road*: 4 McC. 5; 2 Bail. 314; 1 Rich L. 335, 485; 57 S. C. 166; 60 S. C. 78; 37 Cyc. 157. *Jurisdiction at chambers*: 88 S. C. 118; 87 S. C. 566; 67 S. C. 84; 93 S. C. 533; 94 S. C. 199. *Remedy to fix damages*: 1 Code of Laws 1933. *Title and subject matter of act*: 62 S. C. 281.

REP.]

November Term, 1918.

April 21, 1913.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

In 1910 the legislature passed an act to provide for the improvement of public roads in Marion county. It provided for issuing bonds and a commission to carry out the work. In planning for the execution of their work, the commission determined to cut off an angle between two roads leading into the city of Marion, and thus shorten the distance between the city of Marion and the outlying sections of Wahee township. This cut-off ran through a field of the appellant. To this appellant objected and filed this action for injunction. The following is the complaint duly verified:

"The complaint of the above named plaintiff respectfully shows to the Court:

"I. That plaintiff is the owner of about 100 acres of valuable arable land, situate in Wahee township, in the county and State aforesaid, and pays taxes thereon; that said lands are free of stumps, in a high state of cultivation, and have a splendid crop of cotton and corn growing thereon. For a more particular description, see plat of same made by J. M. Johnson, hereto attached, marked 'exhibit A,' the land in question lying between the points marked in red ink on said A, B, C, and D.

"II. That on the 30th day of August, 1913, a notice of which the following is a copy, was served on plaintiff: 'Notice of Condemnation. State of South Carolina, Marion county, *in re* Road and Highway Commission for Marion county, S. C., against Mrs. L. V. Johnson. Whereas, the Road and Highway Commission for Marion county met at the office of L. D. Lide, Esq., on the 18th day of August, 1913, at which meeting Commissioners Montgomery, Smith, Stackhouse, Baker and Johnson were present, and Commissioner Baker offered the following resolution; and whereas, it is the judgment of this commission that the connection



between the roads leading from Wahee Neck to the Marsbluff Ferry road be relocated and straightened, *i. e.*, so that the alignment of the stretch of road from D. McIntyre's place be preserved, and projected until such alignment strikes the Marsbluff Ferry road near the west end of the Cat Fish causeway; such relocation being for the material interest of the traveling public; and whereas, for the purpose of relocating such road it is deemed necessary to acquire right of way over a portion of the lands of Mrs. L. V. Johnson; and it is also deemed necessary that the same be acquired by condemnation: Be it resolved, that the necessary legal steps be taken to condemn and establish such right of way, and that compensation and damages therefor be assessed; and the said right of way, be surveyed and located by J. R. Pennell, resident engineer for the said highway commission, at the time of the assessment of the said compensation and damages. The motion to adopt the said resolution being seconded by Commissioner Montgomery, the same was unanimously adopted. You will therefore take notice that a right of way, as aforesaid, is required over your land for the purpose of relocating the road as aforesaid, and that compensation and damages therefor will be assessed on the premises on 10th day of September, 1913, at 10 o'clock a. m., and that said right of way will be surveyed and located by J. R. Pennell, resident engineer, at the time of the assessment of the said compensation and damages; and that the said commissioners will then and there view the said premises, and hear all testimony desired to be offered with reference thereto. J. M. Johnson, chairman. L. D. Lide, clerk. Dated at Marion, S. C., August 30th, 1913.'

"III. Plaintiff shows further to the Court that the road which defendant proposes to lay out and open will be a new road entirely; that it starts at a point on said map marked with the letter E in red ink, and extends thence a straight line to a point designated by the letter F in red ink; the pro-

REF.]

November Term, 1918.

posed location of the road being marked by a red line on said map.

"IV. Plaintiff shows further to the Court that there is already a splendid road, which has just been put in first-class repair by defendant, at considerable cost to the county, from the point designated by the letter F, to the point designated by the letter B, on said map, a distance of 475 yards, and plaintiff is informed by the chairman of said commission that said commission proposes to thoroughly repair the road between the points designated as E and B, a distance of 425 yards, thus making a first-class road. That the distance between the points designated E and F, is 700 yards, and the lands through which it will go are not as suitable for road building as the place where the road is now located.

"V. Plaintiff shows further to the Court that defendant proposes to run a road diagonally through her field as shown on said map, thus cutting her lands up into short rows of irregular length, and almost ruining its value; that in addition it will greatly interfere with her ditching, and destroy her crops, and will entail heavy and continuous expense on the county, all for no purpose whatsoever except to shorten the road 200 yards.

"VI. Plaintiff shows further to the Court that if defendant is permitted to carry into execution its purposes as outlined in said notice, she will suffer great and irreparable injury and damage; that she is advised that she has no adequate remedy at law, and hence she appeals to this Court for protection.

"VII. Defendant's purpose is not to relocate a road or roads, but that its purpose is to lay out and construct a new road over her lands, and to condemn her lands for this purpose, and she is advised, and so alleges, that defendant has no power to do this, and is acting outside of the law in its endeavor to do so.

"Wherefore, plaintiff prays: (1) That defendant, its agents, officers, servants, and employees be enjoined from

proceeding further in this matter; (2) for such other and further relief as she may be entitled to; (3) that she may have judgment for her costs and disbursements."

(Verified.)

Judge Spain granted a temporary order of injunction, but, on motion of the defendant, dissolved it. From the order dissolving the injunction, the plaintiff appealed upon twelve exceptions, but makes a shorter statement in his argument, and the shorter statement will be considered.

I. "As the statute in question undertakes to confer on the Road and Highway Commission for Marion county the power to exercise the right of eminent domain, it must be construed strictly, and, unless both the letter and the

1 spirit of the statute clearly confer the claimed power, it cannot be exercised." The act does give the power to acquire land by condemnation, but it says, "provided, that when lands are condemned, the damage shall be fixed as now provided by law." The method of fixing the compensation then provided by law was in the county board, and not in the commission, and the commission have no right to assess the compensation. This exception is sustained.

II. "The proviso to section 7 of the act in question does not authorize the defendant in this case to condemn and fix the damage, but leaves this power where it has always been, with the county board of commissioners." This exception is sustained.

III. "But if defendant has the right to condemn plaintiff's property, it can do so for but one purpose, and that is for the purpose of relocating a road."

IV. "That in order to relocate a road there must be a change or abandonment of a material part of the old road; that there being no change of the old road in this

2 case, the proposed road is a new road, and the defendant has no power to condemn for the purpose of laying out a new road."

V. "The complaint having alleged that defendant was endeavoring to condemn plaintiff's land for the purpose of constructing a new road, and the defendant having denied this, an issue was then raised which the Judge could not decide at chambers." While section 7 provides for relocation, section 5 provides for "constructing new public roads." It is immaterial whether the road is called a new road or a relocation of an old road. They had the right to do either. These exceptions are overruled.

VI. "The motion in this case was in the nature of a demurrer, and the rules applicable to demurrers prevail. One of these rules is that the allegations of the complaint are taken as true. Another is that, in passing upon a demurrer, the allegations of the complaint alone are considered; that an exhibit to the complaint cannot be considered." Inasmuch as the plaintiff alleged that the defendant was about to exercise an unauthorized act, and the affidavits in reply did not deny it, this question does not legitimately arise.

VII. "But the exhibit shows that the proposed road will be a new road. It starts on the Wahee Neck road and ends on the Marsbluff Ferry road, and no part of any old road, according to the allegations of the complaint, will be changed." This point has already been disposed of.

VIII. "But, if it is the intention of the defendant to abandon the road from E to B, and thus permit the same to be closed up by the owners of adjacent lands, that defendant will be guilty of abuse of discretion, as it will force

3 the public to travel 1,175 yards up and down hills where they now travel 425 yards over a ridge road, to say nothing of the cost of same." This action is for opening a new road, and not for the abandonment of the old road. The purpose of the commission to abandon a part of a road, or their right to do so, is not before the Court in this proceeding. The point cannot be sustained.

IX. "The act in question is unconstitutional, because it is in violation of section 17 of article III of our State Constitution." This point cannot be sustained. The act

4 provides for the improvement of public highways in Marion county. There is one purpose, and it is sufficiently set forth in the title.

The judgment of this Court is, that the order appealed from be reversed and the injunction continued until the commissioners acquire the land in the method provided by law in like cases, or until the hearing of the cause on the merits.

MR. JUSTICE HYDRICK, *dissenting*. If it be conceded that the commission had no power to fix the compensation for the right of way, the record shows that the injunction was not asked for on that ground. No such objection to the proposed action of the commission was taken before the Circuit Judge, and therefore that ground of objection is not properly before this Court. If the complaint is carefully read, it will be seen that it is there alleged that the proposed change of the road was not the relocation of an existing road, but the opening of an entirely new road, and the injunction was asked for, on the ground, among others, that the commission was not authorized to do more than relocate existing roads. It is nowhere alleged that the commission itself would undertake to assess the compensation, and that it has no power to do so. Paragraph 7 of the complaint is the only one which refers to the matter of condemnation, and it is there alleged that the commission do not propose to relocate a road, but to open a new road on plaintiff's land, and to condemn her land for that purpose, and that "it has no power to do this." Do what? Construing the last part of the paragraph in connection with the first, it is clear that the pleader meant to allege that the commission had no power to *condemn* plaintiff's land for the purpose of opening a new road. The order of the Circuit Judge also shows

that the objection that the commission had no power to assess the compensation was not made before him, for he does not allude to that matter at all, in disposing of the motion. He says: "This act provides, *inter alia*: 'For the purpose of relocating any road, and when deemed necessary, the commission is hereby empowered to acquire by grant, purchase or condemnation, all necessary land: *Provided*, That where lands are condemned the damage shall be fixed as now provided by law in like cases.' From an examination of the complaint and the exhibit thereto, I am of the opinion that the work proposed to be done by the defendant is the relocation of a highway, which is within the powers granted it by the above mentioned act. I do not think I would be warranted in further enjoining the defendant from proceeding under this act. I think the plaintiff has an adequate remedy at law under the condemnation proceedings contemplated by this act for such damage as she may sustain."

This Court has frequently held that points not presented to or decided by the Circuit Court will not be considered by this Court. Parties should not be allowed to shift their grounds or to take positions here not taken on Circuit. It is not fair to the Circuit Judge or to the opposing party. If this point had been made below, the commission might have obviated any controversy on that ground by having the county commissioners assess the compensation.

I think, therefore, the order should be affirmed.

MR. JUSTICE GAGE did not sit in this case.

8813

McAULEY ET AL. v. ORR ET AL.

(81 S. E. 489.)

## DISMISSAL FOR WANT OF PROSECUTION. LACHES.

An action to recover certain real estate and rents and profits against certain defendants, all of whom but one were minors, was instituted March 4, 1889. No guardian *ad litem* was appointed, but a demurrer on the ground that two causes of action were improperly united was sustained November 30, 1891, and plaintiffs were given the right to elect on which cause of action they would go to trial. From 1892, when notice of election was served, until 1912, when a guardian *ad litem* for certain minor plaintiffs was appointed, nothing was done. One of the original plaintiffs died in 1894, after having promised one of defendants that he would abandon the suit. The cause was first docketed in April, 1889, and carried forward from term to term until the October, 1897, term, when it was "stricken off with leave to restore." It did not again appear on the calendar until the April, 1900, term. In April, 1889, a referee was appointed, and in January, 1913, the heirs at law of the deceased plaintiff asked leave to amend the complaint and to serve a supplemental complaint, whereupon defendants moved to dismiss for want of prosecution. *Held*, that plaintiffs were guilty of inexcusable laches, entitling defendants to a dismissal.

Before W. A. HOLMAN, special Judge, Yorkville, July, 1913. Reversed.

Action by Francis M. McAuley and others against A. E. Orr and others. From an order granting plaintiff's motion to amend, and denying defendant's motion to dismiss for want of prosecution and laches, defendants appeal.

The order appealed from was as follows:

The plaintiffs made a motion before the Court at Yorkville, during the term held in July, 1913, to mend their complaint, and for leave to serve a supplemental complaint; the defendants resisted the relief demanded, on the ground of long delay and unreasonable neglect on the part of the plaintiff in the prosecution of this cause, and ask that the complaint be dismissed, and that the plaintiffs be adjudged to

pay the costs. The plaintiffs' counsel objected to the form of the motion, in which this matter was presented to the Court, but I overrule this objection for the reason that the Court of its own motion may raise the question of laches. *Wagner v. Sanders*, 62 S. C. 73.

In order to understand this motion I will briefly state the underlying facts connected with this litigation. On the 4th day of March, 1889, William E. Dickey *et al.*, commenced an action against A. E. Orr, William A. Orr *et al.*, for the recovery of a tract of land in York county, described in the complaint herein, and for an accounting for the rents and profits, against F. H. Barber and W. P. Ferguson, as executors of the estate of John Dickey, deceased. The defendants demurred to this complaint, on the ground of misjoinder of causes of action, the matter was heard before his Honor, Judge Fraser, and he sustained the demurrer and required the plaintiffs to elect upon which cause of action they would proceed, and the defendants under this order elected to proceed upon the cause of action for the recovery of the land, and dismissed the action for an accounting against the executors above mentioned. William E. Dickey, one of the plaintiffs in the original action, died about the 17th day of October, 1894, leaving as his heirs and distributees at law, his widow, Mary G. Dickey, and two children, Frances M. McAuley and William D. Dickey, at the death of their father in 1894, they were infants of tender years and are still minors; that the widow of William E. Dickey intermarried with Marion E. Ardrey, and afterwards died leaving as her heirs at law her husband and children, the widow had two children by her last husband, Mary Clair Ardrey and Inez Ardrey. In 1897 the above cause was stricken from the docket by his Honor, Judge Benet, with leave to restore, and thereafter in 1900 the cause was restored. It will be unnecessary for me to attempt to set out the history as to the title of the land in question, that matter is not before me for adjudication. The defendants



have introduced before me affidavits, going to show the great disadvantage at which they will be placed, on account of the loss of evidence, by reason of long delay, and the failure to prosecute this cause in reasonable time, and this is one of the misfortunes, accompanying inaction, in the prosecution of cases, and the Courts will dismiss a cause for unreasonable delay; but this power to dismiss must, of necessity, depend upon the circumstances of each particular case, what might be unwarranted delay in some cases, would not be so in others; there can be no definite rule, formulated on the subject; this Court in the case of *Babb v. Sullivan*, 43 S. C., page 441, has very clearly expressed the doctrine of laches this way:

“It is confessedly impossible to adopt a general rule and to fix a definite length of delay which shall justify a Court of equity in refusing relief on the ground of laches. Each case must be governed by its own facts, and Courts of equity must be trusted to exercise a salutary discretion. As we understand the doctrine of estoppel by laches, the facts in this case would justify us in holding that even a shorter delay than nine years and six months, inexcusable or unexplained, would have furnished the Circuit Court with sufficient grounds for refusing the order moved for. Delay is not the sole factor that constitutes laches. If it were so, some period fixed by statute or by common law of the Courts would afford a safe and unvarying rule. Laches connotes not only undue lapse of time, but also negligence, and opportunity to have acted sooner; and all three factors must be satisfactorily shown before the bar in equity is complete. Other factors of lesser importance sometimes demand consideration—such as the nature of the property involved, or the subject matter of the suit, or the like. As a definition of laches, however, it is sufficiently correct to say that it is the neglecting or the omitting to do what in law should have been done, and this for an unreasonable and unexplained

length of time, and in circumstances which afforded opportunity for diligence.

This definition will be found adequate as a test to be applied to the vast majority of cases. The doctrine embraced in it is in accordance with the principles and the practice of Courts of equity, which have from the beginning held themselves ready to aid suitors who come in good conscience, good faith, and with diligence; and from the beginning they have discountenanced stale demands, and refused relief from the effect of negligence and inexcusable delay."

Now, there can be no doubt about it, this cause has slumbered on the docket of the Court for a long time, sufficient for the Court to presume negligence, and a want of diligence; has the delay been explained, so as to relieve the parties from this presumption? William E. Dickey, the father of two of the plaintiffs, and to whose rights they have succeeded (if any such rights exist), died in 1894, leaving two children of tender age, and from the testimony they are still minors, the widow died in 1905, leaving two small children, and who are still minors of tender years. I have had a strong inclination to dismiss this case, because the defendants will be put at a great disadvantage, on account of the long lapse of time. But only five years had elapsed from the commencement of the action to the death of William E. Dickey; was this sufficient to raise a presumption of neglect? I think not, as some progress had been made in the prosecution of the action; should the Court impute laches to these minors? Under the circumstances I think not; in other words, the minority of the persons above named, have in my opinion overcome the presumption of negligence, arising from the lapse of time.

It is ordered and adjudged:

I. That said original complaint be, and is hereby, amended in the following particulars:

1. By striking out the names of the defendants, F. H. Barber and W. P. Ferguson, as executors of the estate of John Dickey, deceased, in the title of the said action.

2. By making paragraph XII of said original complaint to read as follows, to wit: XII. That the said John Dickey, under said two deeds from S. J. Dickey, of date the 7th day of June, 1872, entered immediately into possession of said tract of land as trustees aforesaid, and so remained up to the time of his death. Said above mentioned tract of land is described as follows, to wit:

"All that plantation or tract of land known as the Andrew Wherry place, lying in York county, South Carolina, known as Santuc, on the headwaters of Fishing Creek, bounded by lands now, or formerly, of estates of Robert McCreight, D. R. S. Blake and William Wylie and others, and containing one hundred and seventy acres, more or less."

3. By striking out paragraphs XVI and XVII of said complaint.

4. By striking out the 2d and 3d demands in the prayer of said complaint.

II. That the plaintiffs above named have leave to serve upon the above named defendants, within 10 days from the filing of this order, the said supplemental complaint according to the form of the copy thereof served and filed with said notice of motion.

III. That a copy of this order be served with said supplemental complaint, and that defendants have 20 days thereafter within which to answer or plead to said amended and supplemental complaints. W. A. Holman, Presiding Judge. August 8, 1913.

*Messrs. Henry & McLure, Gaston & Hamilton and Marion & Marion*, for the appellants. The latter cite: *Respondents guilty of laches*: 3 Rich. Eq. 484, 485; 64 S. C. 507; 62 S. C. 73; 43 S. C. 441; 67 S. C. 82; 53 S. C. 126; 29 Am. St. Rep. 25; 1 Ohio St. 193; 25 W. Va. 179;

52 N. J. Eq. 1; 30 Atl. 1119; 88 N. C. 72; 18 A. & E. Enc. of L. (2d ed.) 111, and note; 148 U. S. 370; 94 U. S. 806. *Equity and good conscience will not permit action to be revived*: 137 U. S. 566; 145 U. S. 368; 68 Fed. 990; 3 Rich. Eq. 504; 51 S. C. 405; 53 S. C. 463. *Case not properly docketed*: Code Civ. Proc. 276, 314; 42 S. C. 9; 46 S. C. 502. *Procedure*: Code Civil Proc. 170, 335; 67 S. C. 74; 62 S. C. 73. *Laches of trustee imputed to cestui que trusts*: 2 Rich. (19 S. C. Eq.) 412, 424; Car. L. J. 503. *Laches of ancestor and infant heir*: 29 So. Rep. 25; 1 Ohio St. 478; 12 Ohio 193; 25 W. Va. 179.

Messrs. W. J. Cherry, S. E. McFadden and Wilson & Wilson, for respondents.

April 22, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This action was originally commenced by service of summons and complaint on defendants on March 4, 1889. The original parties to the action were W. E. Dickey, D. D. Chambers and Marietta Cornwell, plaintiffs, and A. E. Orr, William A. Orr, "Sis" Orr, and F. H. Barber and W. P. Ferguson, as executors of the estate of John Dickey, deceased, defendants. All of the defendants were at that time minors, of tender age, except A. E. Orr, but were properly served, but no guardian *ad litem* was appointed to represent them, and it does not appear that any one was ever their legal representative. The action was brought to recover land and rents and profits. To the complaint a demurrer was interposed by the defendants, A. E. Orr and Barber and Ferguson, as executors, on the ground that two causes of action were improperly united. His Honor, T. B. Fraser, sustained the demurrer, but by his order, dated November 30, 1891, gave the plaintiffs the right to elect upon which cause of action they would go to trial. It does not appear that

any steps were taken since 1892, when notice of election was served, until 1912, when a guardian *ad litem* for certain minor plaintiffs was appointed. William E. Dickey, one of the original plaintiffs, and the party at whose instance the original suit was instituted, died October 17, 1894, having promised the defendant, A. E. Orr, that he would abandon the suit and have the same dismissed. Notice of election was served upon defendants February 11, 1892. W. E. Dickey died October 17, 1894. Two years and eight months elapsed, and the record fails to show that there was the slightest effort on his part to push the action to trial. The present minor plaintiffs-respondents claim under W. E. Dickey.

It appears that the case was first docketed on Calendar 2 in April term of Court, 1889, and carried forward on said Calendar 2 for 26 consecutive terms of said Court of Common Pleas for York county until the October term of said Court, 1897; and it appears that then the following entry was made by the presiding Judge: "Stricken off with leave to restore"—that said cause was dropped from the calendar, and it does not appear on the same until April term of the Court, 1900, and was then placed on the calendar without any endorsement or entry of any kind. It has been carried on the calendar since that time. The record fails to show that any notice of motion to reinstate or restore was ever given. The records show it was stricken off in April, 1897, and three years after, in April, 1900, it appears on the calendar again. The record shows that in April, 1889, on motion of the plaintiff's attorneys, the cause was referred to Jas. F. Wallace, Esq., as special referee; that in May, 1889, Judge Fraser heard demurrer and passed order heretofore referred to. The record further shows that from November 30, 1891, nothing was done until 1912, when a guardian *ad litem* for Frances M. McAuley and other minor plaintiffs was appointed. The record further shows that the attorneys for the plaintiffs

on March 10, 1889, served upon W. D. Orr, the father of W. A. Orr, Hartwell Orr, and "Sis" Orr, minor defendants in the case, that, unless he appear and represent his children within 20 days after the service of said summons, the plaintiffs' attorneys would apply to the Court and have some responsible person appointed as guardian *ad litem* to represent said children; that the record fails to disclose that any guardian *ad litem* was ever appointed, or that any one ever appeared and represented them. It appears from the record affirmatively that Mrs. A. E. Orr thought Dickey had dropped the suit, and that the death of Dickey and R. L. Crook deprives her and the defendants of material and important testimony to make out their defense; that the death of her brother, John C. Dickey, and F. H. Barber, while this suit has not been pressed for trial, deprives her of important evidence that cannot now be supplied. After the death of William E. Dickey on October 17, 1884, in January, 1913, over 18 years after his death, his heirs at law, after due notice to the defendants, asked for leave to amend the complaint in the particulars set out in the notice, and also ask for leave to serve a supplemental complaint, a copy of which was attached and served with the notice. The matter came on for a hearing before Special Judge Holman. The motion was resisted and countermotion made to dismiss the whole action. These motions were based on notice and affidavits. After hearing the motions, the special Judge, Holman, granted plaintiff's motion and refused defendants' motion by an order, which should be set out in the report of the case. From this order defendants appeal and ask reversal by 16 exceptions, and respondents ask to sustain the order of the Judge upon 7 additional grounds. The exceptions, 1, 2, 3, 4, 5, 6, 7, and 8, of appellants complain of error on the part of his Honor in not holding that the plaintiffs-respondents were guilty of laches, which laches is fatal and dismissing to the complaint, and that he was in error in granting the motion

asked for in allowing plaintiffs to amend and serve supplemental complaint, and in not finding and holding that W. E. Dickey in his lifetime had abandoned the action, and plaintiffs claiming under him were barred, and in not holding that the commencement of the action alone would not be sufficient, but, without due prosecution of the same, would not toll the statute of limitations in a Court of law, and would not relieve the parties of laches in a Court of equity. We think that these exceptions should be sustained.

Twenty-four years have passed since the commencement of this action. There is no satisfactory explanation on the part of the respondents of the delay of 21 years in the prosecution of this suit. Some of the parties are dead. The minor defendants never were represented and knew nothing of the proceedings until notice was served on them of application for last order made in the case. A number of witnesses, who could have explained the transactions, are dead, and there is no one to supply their testimony, and it would be a hardship on the defendants to now have to defend and resist a suit that they thought ended and abandoned after this great lapse of time. With the recollection and memories impaired, some witnesses dead, it would be almost impossible to find out what the truth is as to the issues involved; there is no question but that the plaintiffs are guilty of laches; and while, as a general rule, negligence, or laches, cannot be imputed to minors, the record shows in this case that the right of action accrued to them after the death of their ancestor, and that he in his lifetime commenced the suit, and the statute under such circumstances would commence to run in his lifetime, and his death would not arrest the statute in favor of his minor children. The record shows that the minor defendants were served only in 1889, and no steps taken to have them properly and legally represented before the Court, either by their father or plaintiffs' attorneys, in pursuance of

notice served, and during all the years that the cause was on calendar, or struck off, or restored, they had no one to represent their interests, and whatever was done in no way bound them. The use of due diligence in the prosecution of this cause was upon the respondents; there is an unsatisfactory and inexcusable delay on their part which we think was caused by their laches.

In *Hunt v. Smith*, 3 Rich. Eq. 484, an unexplained delay of 16 years was held to be fatal. Circuit Judge Fraser, acting Associate Justice, and as the organ of the Court, says in *Langston v. Shands*, 23 S. C. 152: "It is earnestly urged, however, that the presumption of payment was arrested by the commencement of an action against the executors of Robert Pitts in 1870 on this bond, and (as we understand the argument) which was still pending when the claim was presented here, notwithstanding the entry of 'struck off' or 'adjourned off' in 1877 at the May term of the Court." That latter expression, which was a very common one used in such cases by the Circuit Judge alluded to, really had no precedent for its use, as far as we are informed, never had any other effect than to induce the clerk to drop the case from the calendar, to be restored without asking leave whenever requested by any party to the action. The words had no meaning, and were so regarded by the profession. If the entry "struck off" had been made, and this is the strongest way in which it can be put as against the claim, the case could have been restored to the calendar on motion made within a reasonable time. Nearly seven years had elapsed since the entry was made on Calendar 1 before any further steps were taken to submit this claim to the Court. The case thus stricken from the calendar or "adjourned off" cannot have such dormant life as to justify a revival of it now. In *Kennedy v. Smith*, 2 Bay, 414, it is said that "all the cases quoted in Blackstone's Commentaries are strong in point and prove that leaving a chasm in the proceedings, without regular



continuance from time to time, will amount to a discontinuance. But the lapse of seven years is so great a laches on the part of the plaintiff in this action that nothing on her part can cure it."

In this case we see nothing to excuse the laches, and there is nothing in the way in which suit is brought on this bond and allowed to drop to arrest the presumption of payment; this Court, therefore, holds that there has been, as to this bond, a presumption of payment, arising from the lapse of time a force equal to the bar of the statute of limitations. *Boyce v. Lake*, 17 S. C. 481, 43 Am. Rep. 618; *Shubrick v. Adams*, 20 S. C. 49. This same doctrine is laid down in *Babb v. Sullivan*, 43 S. C. 441, 21 S. E. 277; *Wagner v. Sanders*, 62 S. C. 73, 39 S. E. 950; *Person v. Fort*, 64 S. C. 508, 42 S. E. 594; *Ex parte Baker*, 67 S. C. 82, 45 S. E. 143.

His honor, Special Judge Holman, was in error in granting the order he did, and in not granting the motion of defendants to dismiss the action. Order appealed from reversed.

Reversed.

MR. JUSTICE HYDRICK, *dissenting*. As briefly as possible I propose to state the reasons why I think the order of the Circuit Court should be affirmed. As the action is dismissed for laches in the prosecution thereof after it was commenced, the delay, the facts and circumstances causing it, and the consequences of it should all be kept clearly in mind. Therefore, it is necessary to state the history of the case. It is an action to recover real estate and the rents and profits thereof, commenced on March 4, 1889, by W. E. Dickey, D. D. Chambers, and Marietta Cornwell, as plaintiffs, against A. E. Orr, William A. Orr, Hartwell Orr, and "Sis" Orr, as devisees of the land in dispute, under the will of John Dickey, and F. H. Barber and W. P. Ferguson, as executors of the will of John Dickey. It

is alleged that John Dickey held the title to the land as trustee for the plaintiffs; that for a number of years prior to his death, he collected the rents and profits thereof, and did not account for them; that he devised the land to A. E. Orr for life, with remainder to her children, William Hartwell, and "Sis," who are infants under the age of 14 years, and that A. E. Orr is in possession thereof.

The case was docketed at the April term, 1889, on Calendar 2, and was continued on that calendar until the October term, 1897, when the following entry was made by the presiding Judge: "Stricken off, with leave to restore." It was dropped from the calendar, but was restored thereto at the April term, 1900, and has been continued thereon ever since.

By consent order, dated April 18, 1889, the issues of law and fact were referred. A. E. Orr and the executors of John Dickey demurred to the complaint on the ground that several causes of action were improperly united therein. By order dated November 30, 1891, the demurrer was sustained, and the plaintiffs were required to elect which cause of action they would try, and were given leave to apply for an order to amend their complaint accordingly. On February 12, 1892, the plaintiffs served notice that they elected to try the cause of action against the Orrs for the recovery of the land, and that they would apply at the next term for an order allowing them to amend their complaint accordingly. It appears that nothing further was done in the cause, until the order which is the subject of this appeal was applied for, in January, 1913. In the meantime, on October 17, 1894, W. E. Dickey, one of the plaintiffs, died, intestate, leaving as his heirs his widow and two infant children, the plaintiffs, Frances M. McAuley and William D. Dickey, both of whom are still infants. His widow married Marion E. Audrey, and died, intestate, leaving her husband and two children by him, Claire and Inez, both of whom are infants. On January 24, 1913, the children of

W. E. Dickey, by their guardian *ad litem*, and Marion E. Audrey, and his children, by their guardian *ad litem*, moved for an order substituting them as parties plaintiffs in the place of W. E. Dickey, and for leave to file a supplemental complaint. At the hearing of this motion, the defendants moved to dismiss the complaint for failure to prosecute the action. After hearing the affidavits pro and con, the Court granted the plaintiffs' motion. From that order this appeal was taken.

The defendants objected to the order on two grounds. The first is that W. E. Dickey agreed with Mrs. Orr, a short time before his death, that he would drop the action. In the first place, Dickey could not have discontinued the action, except by consent of his coplaintiffs. Chambers says he consented, but Mrs. Cornwell swears she never consented, and there is no evidence that she did. In the next place, the evidence is wholly insufficient to sustain the allegation that Dickey ever made any such agreement. There are only two witnesses to the alleged agreement, Mrs. Orr and Chambers. Mrs. Orr's testimony is clearly incompetent under section 438 of the Code of Procedure. Chambers says, in his affidavit dated March, 1913, that not long before his death Dickey told him that he was willing to drop the case, and, if it was agreeable to him, it would be dropped; that he agreed, and thought it had been dropped. But evidently he was mistaken. Because, in an action, commenced in 1894, by Chambers and Dickey against F. H. Barber, as executor of the will of John Dickey, for the rents and profits of the land in dispute, Chambers testified, on May 17, 1899, which was nearly five years after Dickey's death, as follows: "Mrs. Orr is my mother. I know she claims this land under the will of John Dickey. W. E. Dickey said if Mr. Orr would pay him what he owed him in the store he would abandon any suit for the land, and witness said, if he would do so, he (witness) would also abandon the suit, as Mrs. Orr was his mother. \* \* \* Mr.

Orr owed W. E. Dickey several hundred dollars on account of store account. It has not all been paid, and the suit for the lands has not been abandoned." It appears from this that there was some effort to compromise the case, and Mr. W. B. Wilson, Sr., who was one of the attorneys for the plaintiffs, and had active charge of the case, swears that he was advised of some efforts to compromise, and for that reason the case was not actively pressed to trial. But it is equally clear, from the testimony of Chambers, that as late as May, 1899, no compromise had been effected, and the action had not then been abandoned. Indeed, I do not see how any compromise could have been made after the death of W. E. Dickey, because his infant heirs were not before the Court.

The objection on the ground that defendants have lost valuable evidence by the delay is equally untenable. The principal evidence which they claim to have lost is that of R. L. Crook, who died in 1890, W. E. Dickey himself, who died in 1894, and J. C. Dickey, who died in 1895. Surely no one would contend for a moment that laches could be imputed to the plaintiffs up to the time of the death of W. E. Dickey, especially in view of the testimony that the parties were trying to effect a compromise, which is considered sufficient to excuse the laches of a plaintiff in bringing an action. 18 A. & E. Enc. L. (2d ed.) 112. It is common practice in this State to continue cases on the calendars pending negotiations for a compromise.

Let us next consider what effect, if any, striking the case from the docket should have in determining the rights of the parties. At the time this was done, Dickey had been dead three years, and his infant children had succeeded in part to his interest in the land and in the action for its recovery, but they had not been made parties. No order should have been made in the cause until they were made parties and properly represented. Again, a Judge has no right to strike a cause from the docket, except by consent

of the parties, or upon motion, after notice and a hearing. In this case there is no pretense that it was stricken off by consent or upon motion. Therefore, the entry, "Stricken off with leave to restore," was without authority of law. But, even if the entry was properly and regularly made, what was its effect? Nothing more than that any party to the cause might have it restored to the docket at pleasure. Why should a party be required to move for leave to restore, when leave to restore is already incorporated in the order to strike off? In the case cited by Mr. Justice Watts, the order was "struck off." There no leave to restore was made a part of the order. Here it was. Therefore this case was properly restored to the calendar, without motion, in April, 1900, and has been properly continued on it ever since.

The question then arises: What are the rights of the parties in such a case? At common law the death of a party before trial abated the action, and his representatives had to commence a new action. But the inconvenience and hardship which resulted from this rule have been remedied by statutes. Section 170 of the Code of Procedure provides that no action shall abate by the death of a party, if the cause of action survive; and, in case of death, the Court, on motion, at any time within one year thereafter, or afterwards, on a supplemental complaint, may allow the action to be continued by his successor in interest. The same section further provides that, at any time after the death of a party plaintiff, the Court, upon notice to such person as it may direct, upon application by any person aggrieved, may, in its discretion, order that the action be deemed abated, unless the same be continued by the proper parties, within a time to be fixed by the Court, not less than six months nor exceeding one year from the granting of the order. This section has been construed and applied by this Court in several cases.

In *Parnell v. Maner*, 16 S. C. 348, plaintiff commenced an action against J. W. Lawton, on March 5, 1868, on a promissory note. The case was docketed for trial, and remained on the docket, until the June term, 1870, when it was marked on the docket, "abated by the death of the defendant;" Lawton having died on March 8, 1870, leaving a will of which Maner was executor, but he did not qualify as such until 1879. On October 27, 1880, 12 years after the action was commenced, plaintiff moved for leave to file a supplemental complaint, which was refused. On appeal, this Court held that, under the provision of the Code above mentioned, the filing of a supplemental complaint in such case is a matter of right, and that it is not necessary to obtain leave of the Court to do so, and that the entry on the docket, "Abated by the death of the defendant," was clearly erroneous, and should be disregarded. So, I think, the entry in this case, "Struck off with leave to restore," was clearly unauthorized, and should be disregarded. In that case, as in this, the objection was made that plaintiff had been guilty of laches, but the Court held that he had not, but it was also held that the right to file a supplemental complaint in such a case cannot be defeated by laches, because the Code prescribes no limit of time within which an action may be so continued, and further because a defendant in such a case may protect himself against unreasonable delay on the part of the representatives of a deceased plaintiff in continuing the action by supplemental complaint, under the last provision of that section (that is, by obtaining an order that the action shall be deemed abated), unless continued by the proper parties within the time therein prescribed. Mr. Justice McIver, speaking for the Court, said: "It was argued here that, by lapse of time, the plaintiff has lost the right which he once may have had to continue the action by supplemental complaint against the representative of the deceased defendant. To say nothing of the fact that a large part of the delay

was occasioned by the failure of the present defendant to qualify as executor of the deceased defendant, it will be observed that, while section 144 does limit the time within which an action may be continued by motion to one year, it does not prescribe any limit to the time within which it may be continued by supplemental complaint after the expiration of one year. In New York it has been held, in the case of *Bornsdorff v. Lord*, 41 Barb. 211, that the supplemental complaint provided for by section 121 of the Code of that State stands in the place of the bill of revivor under the old system of equity pleading; and in a note to the case of *Pendleton v. Fay*, 3 Paige (N. Y.) 205, the case of *Lyle v. Bradford*, 7 T. B. Mon. (Ky.) 115, is cited to sustain the proposition that 'lapse of time from filing the original bill, omission to serve the original defendant with process, and a final disposition of the cause as to the other defendants are no grounds of objection to the bill of revivor in such case.' In addition to this, section 144 of our Code contains a provision by which a defendant may protect himself from unreasonable delay on the part of the representatives of a deceased plaintiff in continuing the action by supplemental complaint; and, while there is no express provision in that section of the Code by which the representatives of a deceased defendant can protect themselves from unreasonable delay on the part of the plaintiff in continuing the action, yet it has been held in New York that in such a case the representatives of a deceased defendant may prevent unreasonable delay on the part of the plaintiff in continuing the action against them by moving for an order discontinuing the action, unless the plaintiff shall, within a specified time, consent to an order continuing the action. *Keene v. La Farge*, 16 How. Prac. (N. Y.) 377."

To the same effect is *Arthur v. Allen*, 22 S. C. 432, where an action, commenced in October, 1867, was continued by supplemental complaint filed 15 years afterwards,

to wit, in June, 1882. In *Best v. Sanders*, 22 S. C. 589, a suit for partition was commenced in 1854. In February, 1855, the chancellor declared the rights of the parties and ordered the writ to issue. The writ was issued, but, on account of disagreement among the commissioners, no return was ever made. In February, 1856, the cause was marked "ended" on the docket. In 1883, 29 years after the action was commenced, and 23 years after the original plaintiff, who was an infant when the action was commenced, had attained her majority, which was in 1860, she moved for leave to file a supplemental complaint against the original parties and the heirs of those deceased. Her motion was refused. On appeal, the order was reversed, and this Court held: "That the evidence showed that the entry on the docket, if not a mistake, was premature, and that the case was never ended; that, under the old equity practice, the right to revive would exist without any well-defined limit in point of time, and that it might have been accomplished by a bill in the nature of a bill of revivor and supplement; that this right has been substantially preserved by the Code of Procedure (section 142); that this is a question relating merely to pleading, and does not affect the merits, but there is no authority for applying the statute of limitations to the right to institute such proceedings, although the relief therein demanded may be barred."

In *Bryce v. Massey*, 35 S. C. 127, 14 S. E. 768, the action was commenced in 1872 by T. W. Dewey. It remained on the docket until the death of Dewey, when it was dropped on account of his death. In 1882 or 1886 (there is a discrepancy in the report of the case as to the date), Bryce was appointed administrator of Dewey's estate and filed a supplemental complaint. Massey contended that, as the supplemental complaint was not filed until more than 10 years had elapsed after the death of Dewey, the lapse of time was a bar to the right to revive the original action. Mr. Chief Justice McIver, speaking



for the Court, said: "We think it only necessary to refer to the cases of *Parnell v. Maner*, 16 S. C. 350, and *Best v. Sanders*, 22 S. C. 589, to show that the plaintiff was not barred by lapse of time from filing his supplemental complaint."

It seems to me that these cases are conclusive of the case at bar. I do not see how the Court can deny the plaintiffs the right to file their supplemental complaint without overruling them. While I do not contend that, under the construction given to the provisions of section 170 of the Code by this Court in the cases above cited, an infant would have any rights superior to those of an adult, because the same right is given to all litigants by the statute, yet if that were so, and the equitable doctrine of laches were applicable, it seems to me that the fact that the plaintiffs were and are still infants would prevent the application of that doctrine. For I think the principle is too well settled to require argument or citation of authority that laches will not be imputed to infants, unless required by statute or some positive rule of law. "In the absence of any positive provision of law to the contrary, an infant will not be prejudiced by lapse of time, nor is laches ordinarily imputable to infants to their prejudice." 22 Cyc. 512. In each of the cases above cited, in which the defense of laches was invoked and denied, the parties were adults, and, in at least one of them, a much greater time had elapsed than in the present case.

In *Best v. Sanders* it was squarely ruled that there is no authority for applying the statute of limitations to the right to file a supplemental complaint, and the same principle was reiterated in *Bryce v. Massey*. In that case, if the plaintiff had not been allowed to continue the action by supplemental complaint, he could not have recovered, for a new action would have been barred by the statute. The principle of these cases was reaffirmed by this Court in *Sims v. Davis*, 70 S. C. 374, 49 S. E. 872.

It follows, therefore, that those cases in which the right to commence an action has been held to be barred by laches are not applicable where the right of a party to carry it on, after it has been commenced without laches, is invoked. Of course, if the original plaintiffs were guilty of laches, in commencing their action, that defense would avail against their successors in interest, even though they are infants, as well as it would against the original plaintiffs, for laches in commencing the action would have been a bar to it, when it was commenced. But there is no contention here that the action is barred by laches in commencing it.

In the case cited by Mr. Justice Watts, the parties were *sui juris*, and they were denied relief because they were guilty of laches in commencing the action or proceeding.

MR. JUSTICE GAGE did not sit in this case.

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8814

CANNON v. ATLANTIC COAST LINE R. R. CO.

(81 S. E. 476.)

WATER AND WATERCOURSES. SURFACE WATERS. PLEADINGS. PRESCRIPTION.  
ADVERSE USER.

1. A complaint alleging the destruction of plaintiff's crops through flooding caused by the negligent construction of a railroad in not providing means sufficient to drain water from the land in the vicinity, but from which it appears that it was the surface water, and not the water from any natural watercourse, which caused the damage, does not state a cause of action.
2. An allegation that ditches obstructed by the construction of a railroad had been used to drain the lands occupied by plaintiff for more than 20 years is not sufficient to establish a prescriptive right to the use of such ditches without an allegation that the user was adverse.

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FOOTNOTE—On the question of obstruction of surface water as element of damages in eminent domain proceedings for a railroad right of way, see note in 18 L. R. A. (N. S.) 287.

Before BOWMAN, J., Charleston, October, 1913. Affirmed.

Action by F. S. Cannon against the Atlantic Coast Line Railroad Company. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed, with leave to plaintiff to apply for permission to amend his complaint.

Paragraphs 3 and 4 of the complaint are as follows:

"(3) That heretofore, in the year 1912, the plaintiff had in cultivation a crop of cabbage containing about 25 acres, near Meggetts, upon which he had planted cabbage, for sale as aforesaid, and that such plantation upon which said cabbage was planted was rented or leased by him for that purpose, and that said land upon which said cabbage was planted as aforesaid, adjoins the right of way of the defendant company, and at which point it has an embankment constructed; and the plaintiff alleges that during the spring of 1912 he was so engaged in raising a crop of cabbage on said plantation, and that the defendant, by backing the water on said cabbage, caused the same to be injured, damaged and ruined by reason thereof, so that he received no yield from the said crop, in that the defendant had a trunk under its railroad track to carry off the water from said plantation and the surrounding territory, which was drained by means of ditches, and that said water passed through said trunk, and the plaintiff alleges that said trunk was ever since its construction insufficient to carry off the volume of water at the point where the plaintiff was planting, and that, in consequence of such defective and insufficient trunk, the water was caused to be backed and thrown upon the land upon which the plaintiff planted said crop of cabbage.

"(4) That for more than 20 years the ditches as aforesaid were used to drain the lands and to carry off the water of the surrounding territory, including the place upon

which the plaintiff planted his cabbage, and was so in use before the said railroad was constructed, and that, when the defendant built its railroad, it constructed a trunk in order not to stop the flow of water through said ditches, which had been used for a long time for the purpose of draining the land in that vicinity; but the plaintiff alleges that said trunk was insufficient for the purpose, and, in consequence thereof, the natural flow of the water was obstructed to such an extent that the same was backed and thrown upon the said lands, so occupied by the plaintiff, whereby the said cabbage crop was injured and ruined as aforesaid. That the said defendant negligently and carelessly constructed an insufficient trunk at the time of the building of the said road, and has continued since that time negligently and carelessly to allow an insufficient trunk to remain for the purpose of carrying off the water conducted through said ditches into said trunk, and that the defendant recognized the necessity of constructing said trunk, and knew or should have known that the same was defective or insufficient to convey and carry off the water for the purpose of draining the lands in the vicinity of its railroad at the point above mentioned."

The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, in that:

(1) The only inference to be drawn from the facts alleged in the complaint is that the water alleged to have been backed upon plaintiff's land was surface water, the obstruction of the flow of which defendant had a right to protect itself against, and which could form the basis for no cause of action.

(2) Because surface water is regarded as a common enemy which each one may keep off his own premises even though by so doing it is thrown or kept on the land of another.

Because there is no allegation that a stream or watercourse has been obstructed by defendant; there is no allegation that a stream flowing in a particular direction was obstructed; there is no allegation that there was any well-defined bed or channel or banks of the water which was obstructed, and through which it was accustomed to flow; there is not a single allegation from which an inference could be drawn that the water in question was the water of a natural watercourse.

*Mr. W. A. Holman*, for the appellant, cites: 61 S. C. 554.

*Mr. W. Huger Fitzsimons*, for the respondent, cites: *Surface water*: 87 S. C. 415; 83 S. C. 314; 61 S. C. 548; 54 S. C. 242; 62 S. C. 18; 39 S. C. 472. *Easement by prescription*: 69 Am. St. Rep. 385; 52 N. E. 1008; 85 S. C. 6; 40 Cyc. 649; 73 N. E. 904; 6 L. R. A. (N. S.) 155; 71 S. C. 157; 83 S. C. 317; 34 S. C. 62; 85 S. C. 442; 67 S. C. 499.

April 22, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This is an appeal from an order sustaining a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

Paragraphs 3 and 4 of the complaint, together with the grounds of demurrer, will be incorporated in the report of the case.

In the case of *Lawton v. Railway*, 61 S. C. 548, 39 S. E. 752, where the allegations of the complaint were similar to those now under consideration, the rule as to surface water was thus stated: "There is no allegation that

1 there was a 'stream usually flowing in a particular direction,' nor is there any allegation that the water obstructed flowed 'in a definite channel, having a bed, sides,

or bank,' nor is there any allegation that there was 'any well-defined bed or channel with banks,' through which the water obstructed was accustomed to flow; and this, as said, 'is essential to the existence of a watercourse.' Indeed, there is not a single fact alleged from which an inference could be reasonably drawn that the water in question was the water of a natural watercourse. On the contrary, the irresistible inference from the facts stated in the complaint is that the water obstructed was nothing but surface water, which was drained from plaintiff's land by the ditch, a mere *artificial* channel. No lapse of time could invest such a channel with the characteristics of a natural watercourse. Looking at the complaint alone, it would seem that the gravamen of the plaintiff's claim is the filling up of the ditch referred to in the fourth paragraph of the complaint. If so, there is no allegation that the ditch or any part thereof was on the plaintiff's land, nor is there any allegation that the plaintiff had, either by grant or prescription, acquired the right to use such ditch as a means of draining his lands; and therefore the filling up the ditch would not afford him any cause of action."

The case of *Touchberry v. Railway*, 87 S. C. 415, 69 S. E. 877, shows that the principle is the same whether the roadbed was negligently constructed or not.

The appellant's attorneys do not dispute these principles, but contend that the allegations of the complaint  
2 are sufficient to show that the plaintiff had acquired a right by grant or prescription.

The complaint in the case of *Lawton v. Railway*, 61 S. C. 548, 39 S. E. 752, alleged that the defendant railroad caused an embankment to be erected, and a ditch to be filled, which had been used for a period of 30 or 40 years, and, by the erection of said embankment and filling of said ditch, had cut off the natural drainage of a large part of plaintiff's lands, whereby he was damaged in the sum of \$1,000. In discussing this allegation, the Supreme Court

said: "There is no allegation of any fact tending to show that the plaintiff had acquired, either by grant or prescription, the right to use the ditch as a means of draining his lands, for there is no allegation of any *adverse* use, made either by plaintiff or any one else, of the said ditch for that purpose, and certainly a ditch—a purely *artificial* channel cannot with any propriety be regarded as a natural water-course. We do not think, therefore, that there was any error in sustaining the demurrer."

That case is conclusive of the question under consideration. After using the language just quoted, the Court proceeded as follows: "But this Court is always reluctant to dismiss a complaint for the want of allegations necessary to show that plaintiff has a cause of action, especially where, as in this case, there is a manifest omission in the complaint. For while it is true that cases must be decided upon the facts as they appear in the record, and, if there is any omission, inadvertent or otherwise, in such record, it is incumbent upon the appellant to supply the same before the case is submitted for hearing, yet, recognizing the fact that any person, even the most careful, is liable to make mistakes or omissions, we are disposed to allow the appellant an opportunity, if he can, to repair such faults. To this end we will allow the appellant an opportunity to apply to the Circuit Court for leave to amend his complaint, if he shall be so advised."

A similar opportunity should be afforded the plaintiff in this case.

It is the judgment of this Court that the judgment of the Circuit Court be affirmed, with leave, however, to the plaintiff to apply to that Court for permission to amend his complaint, provided that such application be made as soon as practicable after the remittitur is filed in that Court.

8816

SMITH v. BROWN.

GRICE v. BROWN.

(81 S. E. 688.)

## APPEAL AND ERROR. LIBEL AND SLANDER. CHARGE. EVIDENCE.

1. In absence of a showing by the record that defendant, in an action for slander, requested a charge that plaintiff could only recover actual damages for constructive malice, but may recover punitive damages for actual malice, error in not giving such a charge cannot be considered on appeal.
2. Damages may be awarded in a slander action only for words spoken at the time alleged in the complaint.
3. Spoken words charging a crime are actionable.
4. An instruction that, in an action for slander, statements made by defendant, derogatory to plaintiff's character, at other times than those alleged in the complaint may be shown on the question of malice, and "shows express malice," is objectionable, as being on the facts.
5. Statements by defendant derogatory to plaintiff's character, made at other times than those alleged in the complaint, are competent evidence of express malice.
6. Error in an instruction, as being on the facts, that in slander statements by defendant derogatory to plaintiff's character, made at other times than those alleged, are competent on the question of malice, "and shows express malice," held; an inadvert statement which could not have misled the jury.

Before RICE, J., Pickens, September, 1913. Affirmed.

Actions by W. M. Smith and H. A. Grice against James A. Brown. From a judgment for plaintiff in each case, defendant appeals.

*Messrs. Carey & Carey*, for appellants, cite: *Malice to be alleged*: 18 A. & E. Enc. of L. (2d ed.) 998, 1093; 25 Cyc. 537, 538; Ogden 291; Newell 842; *Finch v. Finch*, 21 S. C. 342; 3 Hill L. 175; 95 S. C. 90; 10 Rich. L. 414, 89 S. C. 530.

*Messrs. Morgan & Mauldin, J. Robert Martin and Jno. C. Henry*, for respondents. *Messrs. Martin and Henry* cite:



16 S. C. 435; 1 N. & McC. 217; 2 Rich. L. 584, 585; 95 S. C. 93; 45 Am. St. Rep. 45, 583; Cooley Torts 249; 86 Am. St. Rep. 414; 52 L. R. A. 91; 66 S. C. 138; Code Civ. Proc. 199, 215; 1 McM. 468; 25 Cyc. 484; 71 Am. Dec. 271, 274; 8 Enc. Ev. 224, 288 and 259; 41 Am. Dec. 212; 30 Am. Rep. 441; 2 Rich. L. 585; 95 S. C. 93, 94; 2 McC. 288; 73 S. C. 236; 21 S. C. 346; 22 S. C. 378.

April 22, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

These two cases were heard in this Court together. The actions were for slander. The appellant is alleged to have said in each case: "That Henry Grice and Mack Smith stole my turkey and eat it, and I have the proof." These words are alleged to have been spoken in the hearing of others on the 25th of April, 1912, and the defendant is alleged to have spoken similar words to other people on other occasions. The complaint claims that the charge was untrue, and that they were spoken maliciously. The defense was a general denial. The verdict was for the plaintiffs, and defendant appealed. There were four exceptions, but appellant argues but two questions.

1. Appellant claims that malice may be either constructive or actual; that for constructive malice the plaintiff can recover only actual damages, but for actual malice, plaintiff may recover punitive damages, and that it

1 was error for his Honor, the Circuit Judge, not to charge the distinction. The record fails to show that the question was raised on Circuit and cannot be considered in this Court.

In the Smith case, his Honor asked: "Is there anything you want?" The answer was: "Nothing else, your Honor."

In the Grice case, his Honor's attention was directed to the fact that damages could only be awarded for the words

spoken on April 25, 1912, and he promptly charged it, as was said in *Finch v. Finch*, 21 S. C. 345, 346.

2 There was no request made by the defendant as to this distinction. If the defendant's answer or plea was subject to the application of such a principle, he should have called the attention of the Judge to it by a direct request. In the absence of such a request, the Circuit Judge laid down the general proposition, in which, as we have said, there was no error, and that is the only matter before us.

It is unquestionably true, then, that, where the  
3 words charge a crime, the plaintiff may maintain his action.

2. The second error assigned in argument is that his Honor charged on the facts in charging plaintiff's seventh request to charge, which is as follows: "(7) In an  
4 action for slander, statements made by defendant derogatory to plaintiff's character, at other times than those alleged in the complaint, is competent on the question of malice, and shows express malice."

In the Smith case, which seems from the record to have been tried immediately before the Grice case, his Honor said: "Well, I charge, you that, Mr. Foreman, and gentlemen, that it is competent evidence of express malice."

5 As thus stated, the charge is fully sustained by *Morgan v. Livingston*, 2 Rich. 585, quoted with approval in the recent case of *Gill v. Ruggles*, 95 S. C. 93, 78 S. E. 536. If his Honor had said "to show" instead of "shows," it too would have been free from objection.

We cannot, however, sustain the objection here, because his Honor showed that he understood the law in the first case, and his failure to draw the distinction in the second case was mere inadvertence. We feel sure, that,

6 under the latitude given by his Honor, appellant would have called attention to the slip of the tongue

if he had observed it. If he did not, then surely it could not have misled the jury.

The judgments appealed from are affirmed.

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8822

SMITH v. SMITH *ET AL.*

(81 S. E. 499.)

JUDICIAL SALES. FAILURE TO COMPLY WITH BID.

A master in chancery in selling land under a decree only allowed the purchaser three hours in which to comply with the terms of sale, and, upon noncompliance within that time, resold the property. *Held*, that the purchaser was not allowed a reasonable time to examine the title, and hence the resale was a nullity.

Before DEVORE, J., Walterboro, March, 1913. Reversed.

Action by Perry G. Smith, as administrator, and in his own right, against Owens H. Smith and others, to sell lands to pay debts. From a decree ordering the sale, defendant, Sophia A. Stack, appeals.

The facts are thus stated in the decree of his Honor, the Circuit Judge:

"This was an action by Perry G. Smith, administrator of Ann E. Murrell, and in his own right, against the defendants, as her heirs at law; the object being, among other things, to obtain the sale of certain real estate owned by the intestate for the payment of her debts, and for the partition and distribution of the proceeds of sale among the parties, according to their respective rights. The cause was heard originally before presiding Judge T. S. Sease, and his decree was filed on February 3, 1912. This decree, among other things, contained this provision: That the two tracts or parcels of

land, situated and located in the county of Orangeburg, be sold by C. G. Henderson, Esq., master, on sales day in March, 1912, or some convenient sales day thereafter, to be named by plaintiff's attorneys, at the courthouse at Orangeburg, S. C., at the usual hour for making public sales, for one-half cash, balance on a credit of one year, and be secured by bond and mortgage of premises sold, with interest from date of sales. That in the event of the failure of the purchaser or purchasers to comply with the terms of sale, that the said master do resell the same on the said sales day, or some convenient sales day, to be named by plaintiff's attorneys, until compliance be had.'

"Soon after the filing of the decree, these lands were duly advertised for sale on sales day in March by the master for Colleton county. Within the time allowed by law, notice of intention to appeal on the part of the defendants, Stacks, was served upon the plaintiff's attorneys. No further step was taken until the latter part of February. At that time, but on what particular day does not appear, the attorneys for the Stack defendants, who had given notice of their intention to appeal to the Supreme Court, gave the plaintiff's attorneys notice that on March 2d, they would move before Judge Robert E. Copes, at Orangeburg, S. C., for an order fixing the amount of the undertaking to be given by the appellants in order to stay the sale. \* \* \*

"Judge Copes made an order fixing the amount of the undertaking at \$1,000, and providing that the same should be approved 'by the clerk of Court in order to stay the sale of the real estate aforesaid, as provided by statutes in such case made and provided.' On Monday morning, March 4th, the day on which the sale was to be had at Orangeburg, the appellant's attorneys handed to the clerk of the Court for Colleton county the undertaking; such undertaking being in the sum of \$1,000, made payable to the clerk of Court for Colleton county, and approved by the clerk of Court for Orangeburg county, and dated on February 29, 1912. \* \* \*

"At the usual hour for holding sales on Monday, March 4th, the master for Colleton county sold these lands in accordance with the decree of Judge Sease. Before the bidding commenced, he made public announcement that, 'under the terms of the decree, I should require compliance with the terms of sale within three hours, and that I would be at the office of Glaze & Herbert, where compliance could be made, and, if compliance was not had at that time, the property would again be offered for sale on the same day, at the risk of the former purchaser, as provided in the decree.' The property was then offered for sale, and was bid in by A. J. Hydrick, Jr., Esq., an attorney, for Sophia A. Stack, the wife of D. D. Stack, one of the defendants, for the sum of \$6,000. The purchaser did not comply with the terms of the sale within the time stipulated by the master, and made no offer to comply, and at the expiration of the time specified by the master he again offered the property for sale, and the same was bid off by W. B. Gruber, Esq., one of the plaintiff's attorneys, for the sum of \$1,200. Mr. Gruber subsequently assigned his bid to J. G. Padgett, Esq., and Mr. Padgett complied with the terms of the sale, and the master executed title to him. From the proofs submitted to me on the hearing, I am satisfied, as a matter of fact, that Mr. Hydrick's bid for Sophia A. Stack was at the request of the attorneys for the Stacks, and that that bid is not entitled to be treated as a *bona fide* offer for the property. \* \* \*"

His Honor, the Circuit Judge, concluded his decree by ordering that the master's report of sale be confirmed.

Mr. A. J. Hydrick, Jr., made the following affidavit, which shows what took place when the property was sold: "Personally appeared before me A. J. Hydrick, Jr., who, being duly sworn, says that he is and was at the times hereinafter mentioned a practicing attorney at the Orangeburg bar, in the county of Orangeburg, in said State. The deponent was present when C. G. Henderson, master of Colleton county, offered for sale certain real estate in the above enti-

tled cause in front of the courthouse at Orangeburg, S. C., at about 12 o'clock m., on sales day in March of 1912, and that at said sale he became a purchaser of said property as attorney for Mrs. Sophia A. Stack; that, immediately prior to the time when the said master offered the said property, certain notices protesting and objecting to the sale were offered and made known to the bidders, and to Messrs. Brantley and Zeigler and W. C. Wolfe, attorneys for certain of the parties in said cause; that these notices were read either by M. E. Zeigler, Esq., Thos. F. Brantley, Esq., or W. C. Wolfe, Esq., or by two of them. Deponent does not remember and cannot say positively which one or two of these gentlemen actually read the notices, but remembers that certain protests were read. \* \* \* Deponent further remembers that the master demanded of him an immediate compliance on the part of his client, whereupon deponent stated that he could not advise his client to comply until he had an opportunity to examine the title to the said property, whereupon the master announced, if the bids were not complied with by 2 o'clock p. m. of that day, that he would resell the property; that deponent did not attend a resale of the property at 2 o'clock p. m., nor was he among the bidders at that time, nor did he make any bid or bids thereon. (Signed) A. J. Hydrick, Jr."

There are other affidavits substantially to the same effect.

*Messrs. A. J. Hydrick, Jr., Robert E. Copes and W. B. Martin, for the appellant, cite: Purchaser party to action: 71 S. C. 87; 37 S. E. 289; 24 Cyc. 30. Entitled to notice of filing of report on sale: 2 Code Civ. Proc. 328, 332; 24 Cyc. 30. And to appeal from order confirming same: 37 S. C. 289.*

*Messrs. Brantley & Zeigler and Wolfe & Berry, also for appellants, cite: Circuit Judge cannot modify order of another Judge: 85 S. C. 570. Sale in violation of stay order: 17 A. & E. Enc. 1004. Purchaser entitled to time to*

*examine title and comply*: 37 S. C. 23; 87 S. C. 357; 58 S. C. 457; 13 S. C. 212. *Construction of will*: 93 S. C. 213.

*Messrs. Howell & Gruber*, for respondent, cite: *Appellant not a party to action*: 18 S. C. 501; 71 S. C. 87; *Ib.* 321; 16 S. C. 550; 23 S. C. 111; 23 S. C. 112.

April 23, 1914.

The opinion of the Court, after reciting the above stated facts, was delivered by MR. CHIEF JUSTICE GARY.

The practical question is whether there was error in the resale of the property after it was bid by Mr. A. J. Hydrick, Jr., as attorney for Mrs. Sophia A. Stack.

In *Chemical Co. v. McLucas*, 87 S. C. 350, 69 S. E. 670, the Court says: "The principle is well settled in this State that a purchaser of land, under a decree rendered by the Court, in the exercise of its chancery jurisdiction, is entitled to a reasonable time, after bidding off the property, to ascertain whether the title is definite"—citing the case of *Mitchell v. Pinckney*, 13 S. C. 212. To the same effect is the case of *Fuller v. Missroom*, 35 S. C. 314, 14 S. E. 714, in which the Court announced the principle that a purchaser at a sale for partition is entitled to have the title examined, and a report made thereon by the master.

The facts unquestionably show that Sophia A. Stack was not allowed a reasonable time within which to examine the title, and the authorities just cited sustain the proposition that the resale of the property by the master was a nullity.

It is the judgment of this Court that the judgment of the Circuit Court be reversed, and that Sophia A. Stack, appellant, be allowed 20 days after the remittitur is sent down within which to comply with the terms of the sale under which property was sold; that, if she fails to comply with the terms of sale within that time, then the property shall be resold upon the terms mentioned in the decree.

MR. JUSTICE FRASER concurs in the result.

8824

MIDLAND TIMBER CO. v. J. F. PRETTYMAN & SONS *ET AL.*

(81 S. E. 484.)

LOGS AND LOGGING. SALES OF STANDING TIMBER. TIME FOR REMOVAL.  
CONSTRUCTION OF DEEDS.

1. Where a timber deed gave to the grantee 10 years in which to cut and remove timber, and provided that in case the timber was not cut and removed before the expiration of such period the grantee should have such additional time as it might desire, but that in such event it should, during such extension period, pay interest on the original purchase price annually in advance, the right to an extension was not conditioned upon the commencement of the cutting and removal within the first 10-year period.
2. Under such deed, the grantee was entitled to such an extension of time for cutting and removing the timber as it desired, and not merely to a reasonable time, since the deed was unambiguous and express, and as so construed not invalid.
3. A grant of standing timber with the usual easements relating thereto, and the grant of a permanent and exclusive right of way for a permanent railroad or tramway, may properly be made in the same instrument.
4. Under a timber deed providing that the grantee should have 10 years in which to cut and remove the timber, and that in case it was not cut and removed within such time, it should have such additional time therefor as it might desire, by paying annual interest on the original purchase price, drawn on a printed blank from which the provision relating to the commencement of the cutting and removal was stricken out, a further provision that the timber cut by the grantee for the purpose of opening, clearing, building, and constructing the railroads, tramways, etc., therein provided for, should not affect the time granted for cutting and removing the timber did not in any way limit the right to an extension of time, especially as it should be rejected as surplusage if, as was apparently the case, it was inadvertently left in the deed.

Before SPAIN, J., Berkeley, Fall term, 1913. Affirmed.

Submission without action of controversy between the Midland Timber Company and J. F. Prettyman & Sons and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.



Plaintiff, claiming to own the timber conveyed by the deed mentioned in the judgment, contracted to sell it to J. F. Prettyman & Sons, and offered to convey the timber, but the purchaser declined to accept the title thereto because of its doubt as to plaintiff's right to demand an extension of time in which to cut and remove the timber. The third paragraph in the timber deed provided that the timber cut by the grantee, its successors or assigns, for the purpose of opening, clearing, building, and constructing the railroads, tramways, etc., thereinbefore provided for, should not affect the time granted for cutting and removing the timber conveyed under such deed. The decree below was as follows:

"The facts are succinctly set forth in the agreed case herein, and need not be repeated. The decision depends upon the construction of the timber deed, which is fully set forth in the agreed case. The crucial paragraph of the deed is as follows: 'Second. That the said second party, its successors or assigns, shall have, and the same is hereby granted to it and them, the period of ten years in which to cut and remove the said timber from the said land, and in case the timber is not cut and removed before the expiration of the said period, then that the said second party, its successors or assigns, shall have such additional time therefor as it or they may desire, but in the last mentioned event, the said second party, its successors or assigns, shall, during the extended period, pay interest on the original purchase price, year by year, in advance, at the rate of six per cent. per annum.'

"The defendants claim that the Atlantic Coast Lumber Company, the original grantee in the above mentioned deed, and its assigns, are not entitled to any extension of time beyond the first period of 10 years, which has

1 expired, in which to cut and remove the timber in question, because they did not commence to cut and remove the timber within the first period. To adopt this construction, we would have to read into the deed a provision that the option or privilege of extension

therein granted was *conditioned* upon the commencement of the cutting and removal within the first period. Such commencement was not made a condition precedent by the terms of the deed itself, and there is nothing in the deed from which this might properly be implied. The Supreme Court of North Carolina, in the case of *Norfolk Lumber Co. v. Smith*, 150 N. C. 253, 63 S. E. 954, decided this point contrary to the contention of the defendants, on the ground that to hold otherwise would be against the clear intent of the parties. Further, it is conceded, as it must be, that if the cutting and removal had been commenced within the first period of 10 years, and any portion of the timber had been cut and removed, the option or privilege of extension would apply. This being so, it is entirely immaterial to the owner of the land whether the commencement of the cutting and removal takes place within the first period of 10 years or not.

"In the case of *Alderman & Sons Co. v. Wilson*, 71 S. C. 64, 50 S. E. 643, the Court had under consideration an instrument granting a right of way for a term of 25 years, 'and for as many years after the expiration of the said twenty-five years as the said party of the second part, its successors or assigns, may wish to retain said right of way.' The Court, through Mr. Justice Gary, now Chief Justice, held that the extension clause conferred a privilege or option, and did not affect the rights which had already been granted.

"The defendants further contend that if the grantee in the said timber deed, and its assigns, are entitled to any extension of time in which to cut and remove the timber, they are not entitled to such extension as they may  
 2 desire, but that they are entitled to a reasonable time only. They rely, to some extent, upon the case of *Flagler v. Atlantic Coast Lumber Corporation*, 89 S. C. 328, 71 S. E. 849. In that case the timber company was given by the terms of the deed 10 years from

the time it commenced to cut in which to cut and remove the timber, but the deed was *absolutely silent* as to when the commencement of the cutting and removal should take place. The Court gathered from the language of the deed that the parties had in mind some time for the commencement of the cutting and removal, and that what this time was 'the agreement fails to show.' Hence the Court held that the law would imply a reasonable time. The decision in this case does not touch the point involved in the case at bar. The Court, however, adheres to the principle, well established in this State, that in the construction of a timber deed the intention of the parties controls, provided that intention can be gathered from the 'four corners of the instrument' itself. Where the instrument is express in its terms there is no room for implication. The language above quoted from the deed under consideration, it seems to me, is unambiguous and express in its terms. The contention of the defendants amounts to saying that, while the deed gives to the grantee, its successors and assigns, the right to such extension of time as it or they may desire, they are not entitled to such time, but only to a reasonable time to be fixed by the Court. It is not the function of the Court to make contracts, but to construe and enforce them. The option or privilege of extension can only be exercised by strict compliance with its terms, and by the payment annually, in advance, of the amount specified in the deed. It is not given gratuitously. This construction of the deed seems clear from the language used by the parties, which should prevail, unless the contract is invalid as a matter of law. At the time the deed was executed, the owner of the fee had the right to convey the timber without any specification as to time whatever. I see no reason why she could not sell the timber with the right to remove it within a definite time, and at the same time convey the privilege or option of an extension to be determined by the grantee, upon the condition that he should pay a specific sum annually in advance. Having

sold and conveyed to the grantee the option or privilege of fixing the extension, how can it now be said that the Court should fix it? If the deed had merely provided that the grantee should be entitled to some extension, then the doctrine of reasonable time might apply, upon the principle set forth in the Flagler case, *supra*, to effect an unexpressed intention of the parties. When the parties speak for themselves, the Court cannot imply.

"Defendants further contend that the grantee in the said deed and its assigns are not entitled to any extension of time, because Midland Timber Company, successor in title to the grantee, in the notice given to the

3 landowner set forth in the agreed case, called attention to its claim of a permanent and exclusive right of way for a railroad. It is clear from a reading of the deed that it contains two separate and distinct grants, one of the timber and the usual easements relating thereto, and the other of a permanent and exclusive right of way for a permanent railroad or tramway. Certainly, two or more grants may be made in the same instrument. A deed identical in this respect was before the Court in the case of *Jones v. Lumber Corporation*, 92 S. C. 418, 75 S. E. 698, and the Court held that the deed 'not only conveys the timber, but also the right of way for a permanent railroad.'

"The matter is one of interpretation simply. Of course the deed must be construed as a whole, but I find nothing in the deed taken as a whole which militates against the construction above set forth. It is contended,

4 however, that paragraph 'third' of the deed tends to show that the extension of time should be limited. This clause was very applicable to a deed giving a certain term of years from the *commencement* of the cutting. The original deed in the case at bar was exhibited to me, and I find that it was drawn upon a printed blank used for deeds of that character, but the language relating to the commence-

ment of the cutting and removal was stricken out. If this clause was, as it seems, inadvertently left in the deed, and has no meaning in the deed as executed, it should be rejected as surplusage. See Devlin on Deeds, sec. 1016, for the general principle. But, aside from this, it does not purport to limit in any way the option or privilege or extension.

"It appears from the agreed case that Midland Timber Company, as the successor in title of Atlantic Coast Lumber Company, as the successor in title of Atlantic Coast Lumber 10 years, gave due notice to the owner of the land that it desired an extension of 10 years, and made the proper tender for the first year of this period, and thereafter, when due, the proper tender for the second year of the period. The plaintiff had thus, by its notice, fixed the duration of the extension. Even if the doctrine of reasonable time should apply in this case, there is no evidence whatever that the time desired by plaintiff is unreasonable. On the contrary, it appears to be reasonable.

"The question submitted to the Court must therefore be answered affirmatively. It is ordered, adjudged, and decreed, that the defendant, J. F. Prettyman & Sons, be, and it is hereby, required and directed to accept the title tendered it by Midland Timber Company, and to pay the purchase money as fixed by the contract; the costs to be paid as provided in the agreed case."

To this decree the following exceptions were taken:

Exceptions of J. F. Prettyman & Sons, defendant-appellant, for appeal to Supreme Court.

The defendant-appellant excepts to the decree of his Honor, Judge T. H. Spain, herein, dated October 6, 1913, filed October 9, 1913, in the following particulars, to wit:

1. Because his Honor erred in answering in the affirmative the following question propounded in the agreed case submitted to him, to wit:

“Has the Midland Timber Company, as the assignee and grantee for value of Atlantic Coast Lumber Company, its successors and assigns, the right to have the additional time desired by it in which to cut and remove the said timber from the said land, as set forth in the foregoing notice given by it to Emma A. Heape, provided payment is made by it, its successors, or assigns, annually in advance of the sum of eighteen dollars, being interest on the original purchase price, at the rate of six per cent. during said additional time?” and in requiring the defendant-appellant to accept the title tendered to it; the error being that he should have answered the said question in the negative and should have held that the said defendant-appellant was not bound to accept the title tendered it, in that:

1. The plaintiff-respondent had no right to demand *any specific period of time* after the expiration of the first ten years granted by the contract in question, because the intention of the parties to the said contract, when construed in its entirety, was:

(a) That the cutting should at least commence within the first period of ten years, and it not having been so commenced, the grantee, or its assigns, lost its right to the timber, its title being defeasible upon nonperformance of this act within the time limited; (or)

(b) That ten years was a *sufficient* time in which to cut and removed the timber, and that the extension was obtainable (if this proved to be incorrect) only to *complete*, and it is incumbent upon the grantee or its assigns to show that the first period was *insufficient*, as a condition precedent to its right to demand *any extension*; (or)

(c) That ten years was a *reasonable* time in which to cut and remove, and to entitle the grantee, or its assign, to any extension it would first have to show the *unreasonableness* of the period so fixed; (or)

(d) That the grantee, or its assign, was to have only the right to demand, "from year to year," such time as it or they might desire for the purposes contemplated by the deed, and not any arbitrary fixed period.

2. The plaintiff-respondent had no right to demand *any specific period of time* after the expiration of the first ten years granted by the contract in question, because:

(a) The said contract provides for two periods, the *first or definite period*, and the *extension period*, and the parties clearly had in mind some reason for making a distinction between these two periods, and this reason or intention as gathered from the entire deed was:

(1) That the *cutting* should *commence within the first period*, with an *extended period* in which to *complete*; (or)

(2) That the *first period was sufficient* within which to *cut and remove*, with an *extended period* in which to *complete the work* upon the showing by the grantee of *insufficiency of time*; (or)

(3) That the *first period was a reasonable time* in which to cut and remove, with an *extended period* in which to complete the work upon the showing by the grantee of the *unreasonableness* of the time fixed in the said first period.

(b) The extension clause being for an *indefinite period*, the rule of "reasonable time," laid down in Flagler and McClary cases, must govern, and this reasonable time is to be computed:

(1) From the date of the deed; (or)

(2) From the expiration of the definite period (taking the definite period of time into consideration); (or)

(3) From the expiration of the definite period (without reference to the fixed period).

(c) The extended period is at most a lease for an *indefinite period*, and, therefore, a lease from year to year.

II. Because his Honor erred in answering in the affirmative the question propounded in the agreed case, and sub-

mitted to him (hereinbefore set forth), and in requiring the defendant-appellant to accept the title tendered to it; the error being that he should have answered the said question in the negative, and should have held that the said defendant-appellant was not bound to accept the title tendered it, in that:

The plaintiff-respondent (the assign of the grantee), even if it had the right to demand an extension for a definite period of time, lost this right by making a qualified or conditional tender to the grantor, because:

(a) The so-called permanent and exclusive right of way referred to in the contract in question, and designated in the tender as a grant "in fee simple," was not a grant in fee simple;

(b) The alleged grant of the so-called permanent and exclusive right of way is void:

(1) For uncertainty *as to location*, it not being designated or described in any way, and *as to time*, the right to locate being in no way limited in this respect;

(2) As against public policy, for if the grant is supported, the grantee would have the right to locate the right of way "*whenever and wherever* desired," which would, under the pretext of the grant of a *strip of land*, subject the *entire tract of land* to the permanent control of the grantee.

(c) It is apparent that the parties to the deed had in mind a "*timber contract*," carrying the timber and such rights and easements as were necessary to cut, remove, and handle it, subject to certain limits as to time, etc., and that the grant of a permanent and exclusive right of way for a *permanent railroad* is foreign to the purpose of the deed, and should not have been construed as a grant in fee simple of such right of way.

III. Because his Honor erred in answering the said question in the affirmative, and not in the negative, and in requiring the defendant-appellant to accept the title; the error



being that he should have held that the grantee or its assign had the right to an extension: (a) year by year *only*, or (b) for "a reasonable time" *only* and that the said grantee, and its assigns, had lost their right to the extension for either of such periods, because no tender was made or amount paid to the grantor upon either of these grounds, and that demand, having been made for a *specified time*, and not for an extension *year by year*, or for a *reasonable time*, the grantor, for this reason, had a right to refuse such tender.

Z. T. Pearson, one of the defendants-appellants, duly served exceptions identical to the foregoing, which it is not necessary to repeat, and also the following additional exceptions:

IV. Because his Honor erred in that he misconceived the issue submitted to him in the agreed statement of facts, the issue being not whether the Midland Timber Company, as the assignee and grantee of Atlantic Coast Lumber Company, had the right to have additional time in which to cut and remove the timber from the land referred to in the said agreed statement, but whether the Midland Timber Company, as the assignee of the Atlantic Coast Lumber Company, had the right to have the additional time desired by it in which to cut and remove the said timber from the said land, as set forth in the notice given by it to Emma A. Heape; and deciding that inasmuch as under the terms of the deed of Emma A. Heape to the Atlantic Coast Lumber Company, the said Atlantic Coast Lumber Company had the right to have additional time after the expiration of ten years from the signing of the said deed in which to cut and remove the said timber, then that the said assignee of the said Atlantic Coast Lumber Company should have the right to the particular extension demanded in the notice served upon the said Emma A. Heape and incorporated in the agreed statement of facts.

V. Because his Honor erred in deciding that the said Midland Timber Company was entitled to ten years' additional time from and after the 24th day of January, A. D. 1912, within which to cut and remove said timber, and to use and enjoy said timber rights, ways, privileges, and easements, whereas, under a proper construction of the second clause of the deed of Emma A. Heape to the Atlantic Coast Lumber Company, the said company, its successors or assigns, was granted a period of ten years in which to cut and remove the timber referred to in said deed from the said land, and in case the said timber was not cut and removed before the expiration of ten years from the date of said deed, then the said company should have such additional time therefor as it may have been desired, in the event, however, that the said company should pay during the extended period of time interest on the original price, year by year, in advance, at the rate of six per cent. per annum, provided, however, that it should appear (1) that the said company had not had a reasonably sufficient time in which to cut and remove said timber after it had commenced cutting the same, or (2) that the said company had not had a reasonably sufficient time in which to cut and remove the timber on adjacent lands, which it had purchased.

VI. That his Honor erred in not deciding that the said Atlantic Coast Lumber Company and the said Emma A. Heape had, by the deed referred to in the said statement of facts, agreed that the said company was to have ten years in which to cut and remove the timber referred to for, and in consideration of, the sum of money paid to the said Emma A. Heape, and had also agreed that the said Atlantic Coast Lumber Company should promptly remove the said timber after the expiration of the said ten years, and that the said interest on the original purchase price referred to in the second clause of the said deed was intended as a penalty or liquidated damages to be assessed against the said

Atlantic Coast Lumber Company in order to insure the prompt removal of the said timber, and in not deciding that the said company did not have the said ten years referred to in its notice served upon Emma A. Heape.

*Messrs. Legare Walker and Rembert & Monteith*, for appellant.

*Mr. Legare Walker* submits:

The question is, is the title tendered a good one, of which the following question is conclusive:

Can the Midland Timber Company compel a ten-year extension under the deed under consideration?

This resolves itself into two propositions, to wit:

1. *Did the Midland Timber Company ever have this right? (and)*

2. *If so, has it, by its actions, lost it?*

*Exception I* (with its subdivisions) seeks to show that *the right to demand a definite extension never existed.*

*Exception II and III* seek to show that *even if the right did at one time exist, it has now been lost*, and cites: *Construction of deed*: 66 S. E. 845; 23 S. C. 232; 89 S. C. 328; *Ib.* 183; 90 S. C. 176; 69 S. C. 364; 87 S. C. 566. *Deed uncertain as to rights granted*: 13 Rich. L. 72; 33 S. C. 367. *Testimony to explain admissible*: 20 S. C. 578; 40 S. C. 145; 75 S. C. 220. *Public policy*: 38 S. E. 26. *Different estates in same deed*: 92 S. C. 418; 4 Strob. 208. *Cases distinguished*: 12 Rich. 314; 80 S. C. 106; 61 S. E. 217; 89 S. C. 342; 71 S. C. 64. *Similar deeds*: 90 S. C. 153; 66 S. E. 843. *Reasonable time*: 42 S. E. 1040; 46 S. E. 24; 38 S. E. 26; 13 A. & E. Ann. Cases 1002, note; 111 Ga. 55; 36 S. E. 604; 63 S. E. 954; 14 N. C. 414.

*Mr. C. S. Monteith*, also for appellant, cites: 89 S. C. 328; 90 S. C. 153; 90 S. C. 176; and distinguishes 63 S. E. 954.

*Messrs. Willcox & Willcox, L. D. Lide and Octavius Cohen*, for respondent. *Mr. Lide* cites: 89 S. C. 328; 34 L. R. A. (N. S.) 615; 63 S. C. 954; 70 S. E. 474; 12 Rich. L. 314; 80 S. C. 106; 55 L. R. A. 513; 90 S. C. 153; 73 S. E. 188; 71 S. E. 1123; 66 S. E. 843; 56 Ala. 566; 15 Pa. 371; 113 Mass. 103; 106 Va. 152; 25 Cyc. 1553; 57 S. E. 873; 40 Can. Sup. Ct. 557; 12 A. & E. Ann. Cases 913; 59 Miss. 588; 119 Am. St. Rep. 709; 15 L. R. A. (N. S.) 1123; 89 Miss. 588; 119 Am. St. Rep. 709; 38 S. E. 26; 42 S. E. 1040; 13 A. & E. Ann. Cases 1006; 18 A. & E. Enc. of L. 688; 87 S. C. 56; 71 S. C. 64; 69 S. C. 364; 14 Cyc. 1202; 75 S. C. 220; 92 S. C. 418.

*Messrs. Smythe & Visanska*, also for respondent, read the decree made in this case by Judge Shipp, May 23, 1912, printed in footnote to this case, and reversed, because of defect in parties, by this Court in 93 S. C. 13, and submit:

The questions presented to the Court for its decision are:

(1) Was it necessary for the protection of its rights under the contract for the plaintiff-respondent to commence cutting the timber within the first period of ten years?

(2) Did the plaintiff-respondent have the right to demand that the contract be extended for a fixed period, or was it only entitled to demand "from year to year" such time as it may desire?

(3) Did the plaintiff-respondent have the right to fix the extension period, or was it entitled to demand only a "rea-

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**FOOTNOTE**—On the question of the time for the removal of timber, generally, see note in 55 L. R. A. 525. And upon the effect of reservation of right to remove timber within specified time, see note in 3 L. R. A. (N. S.) 649. And for the rights and remedies of landowner and owner of timber after expiration of time stipulated for removal of the same, see notes in 29 L. R. A. (N. S.) 547, and 47 L. R. A. (N. S.) 882. And as to whether timber sold or reserved without specifying time must be removed within reasonable time, see note in 46 L. R. A. (N. S.) 672.

sonable" additional time within which to cut and remove the timber?

(4) Does the language contained in covenant "Third" of the deed and contract show that it was the intention of the parties to limit the extension?

(5) Was the tender made by the plaintiff-respondent a conditional tender, and if so, did it thereby forfeit its rights under the deed and contract? and cite (1) 59 S. E. 543; 63 S. E. 954; (2) 79 S. E. 1096; 188 U. S. 646, 654; 131

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ADDITIONAL FOOTNOTE.—The following is the Circuit decree by Judge Shipp, referred to in argument of Messrs. Smythe & Visanska:

Midland Timber Company,

*Plaintiff,*

*vs.*

J. F. Prettyman & Sons,

*Defendant.*

#### DECREE.

This is a controversy without action between Midland Timber Company, a corporation, plaintiff, and J. F. Prettyman & Sons, a corporation, defendant, in the nature of a suit for specific performance.

It appears from the agreed statement of facts that the plaintiff and the defendant entered into a valid contract in writing, by which the plaintiff contracted to sell, and the defendant contracted to buy, certain timber on a certain tract of land in the county and State aforesaid, together with the usual easements; and that under the terms of the said contract, the defendant was to have the term of ten years in which to cut and remove the said timber. The plaintiff acquired title to the timber in question from the Atlantic Coast Lumber Corporation, which acquired title by sundry mesne conveyances from Atlantic Coast Lumber Company, to which the timber was originally conveyed by one Emma A. Heape, by deed dated January 24th, 1902, this deed being set forth in full in the agreed case. The following is the portion of said deed relating to the time for cutting and removing the timber:

"Second. That the said second party, its successors or assigns, shall have, and the same is hereby, granted to it or them, the period of ten years in which to cut and remove the said timber from the said land, and that in case the said timber is not cut and removed before the expiration of the said period, then that the said second party, its successors or assigns, shall have such additional time therefor as it or they

Mass. 529, 531; 70 S. E. 474; 24 Cyc. 1000; 42 Atl. 778; 38 Hun. (N. Y.) 41; 36 Am. Dec. 150, note; 90 S. C. 176; (3) 63 S. W. 974; 12 Rich. L. 314; 80 S. C. 106; 71 S. C. 64; 89 S. C. 328; (4) 69 S. C. 364; (5) 75 S. C. 220.

*Mr. Octavus Cohen*, also for respondent, cites: *Reasonable time*: 119 Am. St. Rep. 709; 63 S. W. 974; 57 S. E.

may desire, but in the last mentioned event, the said second party, its successors or assigns shall, during the extended period, pay interest on the original purchase price, year by year, in advance, at the rate of six per cent. per annum."

Before the expiration of the period of ten years from date of said deed, to wit: On January 18, 1912, and at the expiration of the period of ten years from the date of said deed, to wit: On January 24th, 1912, the plaintiff, as the successor in title of the Atlantic Coast Lumber Company, gave the said Emma A. Heape notice in writing that it desired ten years additional time in which to cut and remove the timber in question, and tendered her the sum of eighteen dollars in legal tender for the first year of extended period, but this tender was declined on both occasions. No part of the timber in question was cut or removed within ten years from the date of the deed. Thereafter, plaintiff tendered to the defendant a deed for the timber and easements in question in compliance with its contract, but the defendant declined to accept the title on the ground that it doubts the right of Midland Timber Company to an extension of ten years in which to cut and remove the timber, and further also doubts the right of the plaintiff to any extension of time whatever. The question submitted to the Court is, whether, under the terms of the deed made by Emma A. Heape to Atlantic Coast Lumber Company, and under the facts stated in the agreed case, Midland Timber Company, the plaintiff herein, has the legal right to an extension of as much as ten years from the 24th day of January, 1912, in which to cut and remove the timber in question, provided it makes the necessary payments annually in advance. If so, the defendant should be compelled to comply with its contract. If not, the defendant should not be compelled to comply. It, therefore, becomes the duty of the Court to construe the timber deed above mentioned.

Applying the principles of construction laid down by the Supreme Court in several recent cases, hereinafter more particularly referred to, the true intent and meaning of the deed seems to be that the grantee, for the purchase price therein mentioned, acquired title to the timber,

62; 127 Ga. 649. *Construction of deed*: 90 S. C. 176; 70 S. E. 474; 154 N. C. 248; 131 Mass. 529; 89 S. C. 456.

April 23, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

For the reasons therein stated, the judgment of the Circuit Court is affirmed.

MESSRS. JUSTICES HYDRICK and FRASER concur.

MR. JUSTICE WATTS, *dissenting*. I cannot concur in the opinion of the Chief Justice in adopting the decree of the Circuit Court as the judgment of this Court for the reasons

defeasible upon its failure to remove the same within ten years from the date of the deed; together, however, with the right to extend the time for cutting and removing the timber for such length of time as it might desire, but upon the express condition that it should pay a new and valuable consideration for each year of the said extended period annually in advance. In other words, the first period of time was absolutely fixed, while the extended period by the express term of the contract, was left to the grantee to fix, but the longer time it elects, the greater amount it will have to pay. This appears to be the meaning of the deed from the interpretation of its language. It is the duty of the Court to construe contracts as they are written, unless they violate some established rule of law. If this construction of the deed in question be correct, it would follow that the plaintiff is entitled to have the defendant comply with its contract.

The Supreme Court of North Carolina, in the case of *Bateman v. Kramer Lumber Company*, 70 S. E. 474, 84 L. R. A. (N. S.) 615, holds that the provision for an extension of time in a timber deed, conferring as it does a privilege and unilateral in its obligation, partakes to some extent, of the nature of an option, and, therefore, the grantee must strictly comply with its terms by notifying the grantor on or before the expiration of the specified period and tendering the stipulated amount. This rule appears to be eminently just, and it is in accordance with the decision in the case of *Hill v. Burton Lumber Company*, 90 S. C. 176, 72 S. E. 1085. I think the plaintiff has fully complied with

assigned by the Circuit Judge. This is the second appeal in this case; the first appeal will be found in 93 S. C. 13, 75 S. E. 1012. It is not necessary to consider the grounds of appeal separately. The case was heard on the Circuit, on an agreed state of facts, and in these facts the question of reasonable time was not mentioned, and yet his Honor found that the time desired by the plaintiff was not unreasonable, but, on the contrary, appeared to be reasonable; he was

this rule. In the case of *Alderman v. Wilson*, 71 S. C. 64, 50 S. E. 648, there was a clause in a right of way deed relating to the use of a right of way very similar in its language to the clause now under consideration, which the Court held conferred "a privilege or option."

The defendant contends, however, that the deed cannot be construed as above for the reason that inasmuch as the cutting and removing of the timber was not *commenced* within the specified period of ten years, the grantee and its assigns have no right to any extension whatever.

It might suffice to say that such a construction of the clause in question would tend to defeat the manifest intention of the parties gathered from the language used. This deed is very different in its terms from the deed construed by the Court in the case of *Flagler v. Atlantic Coast Lumber Corporation*, 89 S. C. 828, 71 S. C. 849, where the period of time began from the commencement of the cutting and removal. There is nothing on the face of the deed in the case at bar which required the grantee to commence cutting during the period of ten years. His failure to commence, or complete if he did commence, would, of course, determine his estate, unless he properly took advantage of the right to an extension of time. A similar question was before the Supreme Court of North Carolina in the case of *Norfolk Lumber Company v. Smith*, 68 S. E. 954, where the position was taken that the extension simply permitted the grantee to remove, and not to cut and remove, and the Court held, upon the second hearing of the case, that the grantee had the right both to cut and remove for the period covered by the extension, "this being the clear intent of the parties." The same doctrine was laid down in the case of *Bateman v. Kramer Lumber Company*, *supra*. The deed does not say that in case the cutting and removal of the timber is not completed, the grantee may have an extension, but says "in case the said timber is not cut and removed."

The defendant further contends that if the plaintiff is entitled to any extension of time, it would only be entitled to a reasonable time, taking the position that this is the logical result of the decision in the case of *Flagler v. Atlantic Coast Lumber Corporation*, *supra*.



clearly in error in determining and deciding an issue that was not before him, and committing this Court by adopting his decree as the judgment of this Court to a decision and a policy that will be far-reaching in its effect and prejudice other cases of similar character. Each case must stand upon the particular facts and circumstances. In the case at bar the grantor granted the timber on the land, 324 acres, on

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The following language from the case of *Butterfield Lumber Company v. Guy*, Miss., 46 So. 78, 15 L. R. A. (N. S.) 1123, upon the construction of timber deeds, is, I think, very apt in this connection:

"No topic in the law has been the subject of a greater variety of decisions than the one involved in this suit. Each case, in a large measure, must rest upon the interpretation of the particular contract under which it arises, since nearly every contract contains different terms. We can derive little benefit by a resort to the authorities of other States, because of the conflict of decisions. The only safe rule for this Court to follow is to give effect to the contracts which the parties themselves have entered into, interpreted according to the laws of this State as shown by former decisions dealing with this character of deed. The precise question presented has never been decided in this State."

The Courts of many States appear to hold that, apart from the language of the deed, there is a presumption of law that timber is to be cut and removed within a reasonable time, applying this principle even where no time whatever is specified for such cutting and removing. This, however, seems clearly not to be the law in this State. Our Supreme Court has held in the cases of *Knotts v. Hydrick*, 12 Rich. Law 314, and *Wilson v. Alderman*, 80 S. C. 106, 61 S. E. 217, that where no time is specified for the cutting and removal of timber, the owner of the timber cannot be required to cut and remove it within a reasonable time. The authority of these cases is expressly recognized in the Flagler case above referred to, the ground given for the decision of these cases being that "the deeds under construction failed to show by anything on their face, any intention on the part of the parties thereto of limiting the right to remove." In the Flagler case, the Court had under consideration a deed allowing the grantee a certain number of years in which to cut and remove the timber from the time he commenced to cut and remove. Nothing whatever was said in the deed as to when he should commence, but the language of the deed showed that the parties had in contemplation some time for the commencement of the cutting,

January 24, 1902, for \$300, and granted "to it and them the period of ten years in which to cut and remove the said timber from the land, and in case the timber is not cut and removed before the expiration of the said period then that the second party, its successors or assigns, shall have such additional time therefor as it or they may desire, but in the last mentioned event, the said second party, its successors or

and the deed being *silent* as to the time of commencement, the law would imply that the commencement should be within a reasonable time, upon the well established principle "that things agreed to be done *inter partes* shall be done within a reasonable time." The Court adverts several times to the fact that this intention was to be gathered from the language of the deed itself. The gist of the decision is well expressed in the following language:

"Suffice it to say that we are of opinion that both by the inherent reason of the thing, as well as by authority, that the true rule is that whenever it is apparent in a contract that the parties had in view some time for the commencement of the removal of timber, which intent was not embodied in the terms of the contract, that the law will presume, and will enforce that such commencement of the removal of the timber shall be within a reasonable time from the date of the contract."

This Court also refers to the fact that it was argued in behalf of the timber company that "it lies solely within the discretion of the grantee to determine when he will commence," but the Court concluded from the language of the deed that this was not the intention of the parties. It seems to follow, however, that if this had been the intention of the parties, and they had so expressed themselves, the Court would have been bound to enforce such intentions.

In the case at bar, the extension clause leaves nothing to implication, but expressly says that the grantee shall have such additional time as it may desire, provided it complies with the conditions. I can conceive of no reason why such a contract should not be valid and binding. The grantor has expressly granted to the grantee the right to elect how much additional time it will take, provided it pays for the same. How could the grantor come in and say that while she gave this right to the grantee by the specific terms of her grant, the grantee cannot avail itself of the contract, but that the Court must fix the time? It seems to me that this would be substituting the contract of the Court for the contract of the parties. If it had simply appeared from the language of the deed that some additional time was in the minds of the parties, but that

assigns, shall, during the extended period, pay interest on the original purchase price, year by year, in advance, at the rate of six per cent. per annum." The agreed facts in the case show that no timber was removed from the land at all in the 10 years, but that the grantees, attempting to extend the time, on January 18, 1912, tendered to the grantor \$18 and a notice in writing that they would pay the same each

neither party was given the right to fix the time, and the extent of the time was not expressed, then the Court might well say that a reasonable time would be implied upon the principle above mentioned, to wit: That the law implies a stipulation "that things agreed to be done *inter partes* shall be done within a reasonable time." But as Judge Duff well says in the case of *Beatty et al. v. Mattheson*, 40 Can. Sup. Ct. 557, 12 A. & E. Ann. Cases 913, "that rule must always yield where the terms of the instrument are on their true construction sufficient to manifest a contrary intention," and in this case such contrary intention would seem to be sufficiently manifested by the terms of the grant.

In the Flagler case, *supra*, the Court cites and follows the case of *Hall v. Eastman*, 89 Miss. 588, 43 So. 2, which was a case almost identical with the Flagler case, and in which the Court makes this significant language:

"We propose to decide in this case nothing but what this instrument presents for decision. This is not the case of a grant by A, owning both the land and the timber thereon, of the timber in fee simple, without qualification. We will construe that sort of an instrument when the case arises. This is not the case of a deed giving the grantee 'as long as he wishes' in which to remove the timber, nor the case of a deed giving the grantee the right to commence cutting when he pleases. This instrument is peculiar in its terms and express in its provisions."

That case and the Flagler case both cite as authoritative the case of *McRae v. Stillwell*, 111 Ga. 55, 36 S. E. 304. The Mississippi Court says in reference to it: "That case, like this, falls with the class of cases in which the instrument by express provision shows the intention to have been that the cutting should commence within a reasonable time."

I am aware that the case of *Young v. Camp Mfg. Co.*, Va., 66 S. E. 843, involves the construction of a clause very much like the one under consideration, and the Virginia Court holds that this clause should not be "literally construed," and that it confers upon the grantee a reasonable time only. I do not think, however, that this decision is authoritative in South Carolina, for the reason that the authorities upon which

year in advance for the period of 10 years, it being 6 per cent. interest on the original purchase price of \$300. I am decidedly of opinion that the decree of his Honor should be reversed, and the case remanded for the purpose of having evidence as to whether or not the grantees could have removed the timber within the 10 years allowed, and whether or not that was a reasonable time for that purpose,

the Virginia Court relies lay down principles relating to the construction of timber deeds which our Court expressly repudiates. The Virginia Court cites the cases of *Hoflin v. Bingham*, 56 Ala. 556; *Boults v. Mitchell*, 15 Pa. 371, and *Hill v. Hill*, 118 Mass. 108, which are cases involving reservations of grants of timber without specifying any time for the removal of same, and which hold that the timber must be removed within a reasonable time. All these cases are in direct conflict with the decision in the cases of *Knotts v. Hydrick*, and *Wilson v. Alderman*, *supra*.

The Court also cites *Duke v. N. & W. Ry. Co.*, 106 Va. 152, 55 S. E. 548, which holds that where a contract for the sale and delivery of cross-ties to a railroad company fixes no time for their delivery, the contract must be performed within a reasonable time. The holding in this case seems manifestly correct, among other reasons, because it relates to a sale of personal property, but I do not see how this could be regarded as authority in a case involving the question of the removal of standing timber.

The Court also cited the case of *McRae v. Stillwell*, *supra*, but, as already shown, that case lends no support whatever to this doctrine.

The Virginia Court has, I conclude, based its decision upon premises which do not appear to be valid under the laws as laid down in this State, and gives no good reason why the language of the contract should not be construed according to its rational import.

I might add that, even if the plaintiff in the case at bar were only entitled to a reasonable time, it does not appear that the time desired by it is unreasonable.

The defendant also contends that, in any event, the plaintiff is simply entitled to an extension from year to year, and has no right to demand an extension of ten years. It is sufficient to say, in regard to this, that the plaintiff by its tender has simply acquired the present right to an extension of one year, its right to a further extension being dependent upon the payment annually in advance of the amount specified, and the fact that the plaintiff has notified the grantor that it desires only ten

and if not, what would be a reasonable time? The deed contemplated some time to commence, and under our decisions the cutting must be within a reasonable time. In the absence of any testimony to the contrary, it appears to me that from a tract of land in acreage no greater than this, the parties could not have contemplated that it would take 20 years to remove the timber, and during all that time that the

years, cannot be objected by the grantor. Indeed, it would seem to be contemplated that at the expiration of the first period, the grantee should then notify the grantor of the maximum limit of time it desires, and in any view of the matter, I do not see how the grantor can be prejudiced by this notice.

Defendant raises the point that the following language, which will be found in the deed involved in the case at bar, immediately following the clause above construed, shows that it was the intention of the parties to limit the extension:

"The said first party agrees that the timber cut by the said second party, its successors or assigns, for the purpose of opening, clearing, building and constructing of the railroads, tramways, etc., as hereinbefore provided for, shall in no way whatsoever affect the time granted for cutting and removing the timber conveyed under this deed from the tract or tracts aforesaid."

I am unable to see how, in any view of the matter, this clause can have any effect upon the express language of the clause relating to the time for the cutting and removal of the timber. By consent of the parties, the original deed was exhibited to me, and I find that the deed was made upon a printed blank which had been used for deeds granting so many years from the time the grantee should commence to cut and remove, and these words were erased by drawing a pen through them, but the printed clause above quoted was not erased, probably through inadvertence. If the deed had read as the printed form did, that the grantee should have a specified time from the commencement of the cutting and removal, the clause in question was probably intended to mean that if the grantee should enter upon the land and cut timber for the purpose of building a railroad, this should not be construed to mean that the cutting of the timber has been commenced. There is another construction, however, which may be given to the clause, and that is, that it was intended to prevent the position being taken that the grantee, having entered upon the land and cut a portion of the timber thereon, will be held to have exhausted his rights, and will not be permitted to re-enter for this purpose. Subsequently to the execution of

REF.]

November Term, 1918.

owner of the land was deprived of the use of it, and had to pay taxes on it. It should appear before we enforce specific performance that the extension asked for by the respondents was reasonable, and would not work damage, hurt, or injury to the appellants, and especially Pearson, the now owner, and if it does, and that he can be compensated in money, and

this deed, this point was made in the case of *Wilson v. Alderman*, but was not accepted by the Court. But the fact that parties unnecessarily use language to prevent untenable positions being taken cannot prejudice them. See the case of *Lewis v. Chemical Co.*, 69 S. C. 364, 48 S. E. 280.

Defendant further contends that even if the construction above set forth is correct, plaintiff has lost its right to any extension of time on the ground that its tender was conditional by reason of the following language contained in the notice set forth in the agreed case:

"It is, however, expressly understood that this notice of the intention and purpose of the said Midland Timber Company to extend the time within which to cut and remove the said timber, and to use and enjoy the said timber, rights, ways, privileges and easements, as aforesaid, is not intended, nor shall it be taken, to limit in any manner the grant in fee simple to the permanent and exclusive right of way as set forth in the aforementioned deed of conveyance executed by Emma A. Heape."

Defendant's position is that plaintiff has no permanent right of way.

The deed made by Emma A. Heape to Atlantic Coast Lumber Company appears to be a deed for certain timber situate upon certain land, together with the usual rights, ways, privileges and easements incident to the granting of timber. In addition to this, the deed also contains the following clause:

"This deed further witnesseth that the said party of the first part does hereby also grant, bargain, sell and convey to the party of the second part, its successors or assigns, a permanent and exclusive right of way 90 feet wide, upon and across the tract or tracts of land described as aforesaid, and on all contiguous lands, to be selected and located by the said second party, its successors or assigns whenever and wherever so desired, to be used for a permanent railroad or tramway, or for any permanent branch railroad or tramway."

I think that the right of way granted in the clause just quoted is a separate and distinct grant from the rest of the deed. I know of no rule of law, and no authority for such has been cited, which would prevent parties from making separate and distinct grants in the same instrument. It appears to be perfectly obvious that the right of way granted by this clause has no reference whatever to the timber, because in the clause relating to the timber rights, the grantee is given the right "to build, construct, maintain and operate railroads, tramways, cart and wagon ways across said land on such routes as may be selected by the

justice and equity done to both sides without manifest injury to either, then that it may be done. I do not think it necessary to go further and say anything that may handicap any one in any future litigation in reference to those timber grants, as each case must stand on its own merits, and in my opinion the most vital point in each case is the reasonable-

said second party, its successors or assigns \* \* \* and to do any and all other things that may be necessary or convenient for the cutting, handling, hauling and removing of the timber aforesaid." The language last quoted would indeed be meaningless if the right of way referred to above related to the timber. Besides, the said right of way is expressly granted for the purpose of a permanent railroad. The right of the grantee to this permanent right of way would, it seems, exist after the timber was cut and removed, and whether the grantee cut and removed the timber or not. It is true, the notice refers to the grant of the right of way as being in fee simple, but so it is, for the purpose of a permanent railroad. If the right of way has not yet been located, this cannot affect the validity of the grant. The width of the right of way is specified in this deed, but it has been held that even where the width was not specified the grant of a right of way was valid. By the terms of the grant, the grantee is given the right to locate. There is no rule of law against this. It is true, it is suggested in argument, although not set forth in the case, that the right of way has never been located, but an unlocated right of way is valid, the only difference being that equity will not intervene to protect an unlocated right of way. See *Marion County Lumber Company v. Tilghman Lumber Company*, 75 S. C. 220, 55 S. E. 387.

It was doubtless unnecessary in view for any reference to be made to the right of way in the notice above referred to, but the fact that it was mentioned in the notice is immaterial, for it was probably mentioned to prevent any misunderstanding.

My conclusion is that "when parties have made lawful contracts in language leaving no doubt as to the intention, there was no ground for any interference by the Courts, but the contract must be enforced as written." The question presented in the agreed case, for the reasons set forth above, must be answered in the affirmative. It is, therefore,

Ordered, adjudged and decreed, that the defendant, J. F. Prettyman & Sons, be, and it is hereby, required to accept the title tendered to it by the plaintiff, Midland Timber Company, and to pay the purchase price as fixed by its contract; the costs of this case to be paid equally by the two parties thereto, as provided in the agreed case.

(Signed) S. W. G. SHIPP,

Circuit Judge.

Florence, S. C., May 23d, 1912.

Reversed for defect of parties. See 98 S. C. 13.

ness or unreasonableness of the time for removal. In the former appeal in this case it was said, quoting from Mr. Justice Hydrick in *Marthinson v. McCutchen*, 84 S. C. 256, 66 S. E. 120: "It is well settled that specific performance rests in the sound discretion of the Court, and that the Court will not decree specific performance of hard and unconscionable bargains, or where the price is so grossly inadequate as to shock the conscience and raise a presumption of fraud (*Reese v. Holmes*, 5 Rich. Eq. 571), and certainly not where it appears that the contract sought to be enforced does not express the true agreement of the parties, either by reason of fraud, accident, or mistake. The general rule is that to merit the interposition of the Court, it must appear that the contract is fair, just, and equitable. *Cabeen v. Gordon*, 1 Hill Eq. 51; *Holley v. Anness*, 41 S. C. 354, 19 S. E. 646."

Under the facts as agreed on in this case, I do not think judgment should be affirmed, but reversed and remanded for testimony, as hereinbefore indicated.

MR. JUSTICE GAGE did not sit in this case.

8825

AYER v. HUGHES.

(81 S. E. 510.)

PRINCIPAL AND SURETY. QUESTION FOR JURY. PARTITION. MARSHALLING ASSETS. LIENS. PRIORITIES.

1. Suretyship is a mixed question of law and fact, evidence being admissible as to the circumstances under which the alleged surety signed to enable the Court to determine whether the relation exists.
2. In an action for partition, in which it is sought to subject an interest descended to heirs to the *pro tanto* payment of a mortgage executed by the ancestor, evidence held not to show that the ancestor signed the mortgage as surety for certain persons, but to show that she signed it only for her son.
3. The release by a mortgagee or payee of one of the several makers of a bond and mortgage, or the material alteration of the bond by



the payee, will release a surety thereon, where he did not consent thereto.

4. A surety is not discharged by the release to and for him, or with his consent, of a person liable on the instrument.
5. A surety for the payment of a mortgage debt would be only liable for one-eighth of the debt where the principal only had a one-eighth interest in the mortgaged property, though there were only five of the mortgagors, including such surety.
6. The property of one of several mortgagors will not be applied to the payment of the mortgage debt before the property of the surety of another of the mortgagors, where the firstmentioned mortgagor has not imposed such a prior liability upon his property, by contract or otherwise.

Before SPAIN, J., Bamberg, March, 1913. Modified.

Action for partition of lands brought by Carrie Ayer and others against W. F. Hughes and others. From judgment, plaintiffs and a part of the defendants appeal.

*Messrs. Carter & Carter*, for appellants, cite: 44 S. C. 378; 27 A. & E. Enc. of L. (2d ed.) 434; 1 McC. Ch. 451-452; 53 S. C. 24; 15 S. C. 581. *Answer of infant defendants*: 27 S. C. 365; 61 S. C. 572.

*Mr. Francis F. Carroll*, for respondent, cites: 27 S. C. 272; 13 S. C. 513; 61 S. C. 538; 1 A. & E. Enc. of L. (2d ed.) 371, 337, 339. *Irrelevant evidence*: 69 S. C. 360; 74 S. C. 232; 84 S. C. 117. *Statements explained*: 30 S. C. 578; 15 S. C. 587; 41 S. E. 924. *Practice*: 32 S. C. 351.

April 23, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

This action is for partition. About that right there is no issue. Partition has been actually effected by formal decree, and the issue now made was reserved for further consideration. The only primary issue now is the subsection of that one-eleventh interest, formerly owned by Mrs. Sarah H.

Ayer and now descended to her six children, to the *pro tanto* payment of a bond and mortgage executed by Sarah H. Ayer and her four brothers to F. M. Bamberg. The master held that such interest was not liable to any part of the mortgage; the Circuit Court held that such interest was liable in part to the mortgage; and the said six children appeal therefrom.

There are many exceptions, 13 in all; but they do not nearly raise half that many issues.

The first seven exceptions make practically one issue, and that is as to the character of Sarah H. Ayer's obligation when she signed the bond and mortgage. The appellants

contend that it was that of surety for the other

1 signers, and for proof they rely on the declaration

of F. M. Bamberg and the tacit admission of Paul

Kistler Hughes. Granting that both these witnesses regarded Mrs. Ayer as surety and said so, that would not settle the fact. Suretyship is a mixed question of law and of fact; the witnesses may say under what circumstances the signing was done, and the law declares the legal character of such signing.

The witnesses have detailed these as the circumstances: That this 500 acres of land, the value of which does not appear, was owned by 11 persons, in common and in equal shares; that four of the Hughes owners, to wit, William, Richard, Paul, and James, and the son of another owner, to wit, T. J. Ayer, the son of Sarah H. Ayer, embarked in a sawmilling business; that these five owners of five-elevenths of the land, in order to raise a fund to launch the business, borrowed \$1,800 from Gen. Bamberg, to evidence which they made him a joint bond, and to secure its payment executed to him a mortgage on their five-elevenths interest in the 500 acres, and Paul included in the same instrument a two-acre lot in the town of Bamberg; that the sawmill business was owned by the said four Hughes boys and their nephew, T. J. Ayer, William, Richard and Paul owning a

one-fourth each, and James and T. J. Ayer one-fourth together; that 18 months after the mortgage was made, and while he still owned it, of course, Gen. Bamberg, "in consideration of the fact that Mrs. Ayer is only a surety on a certain bond and mortgage \* \* \* and in further consideration of part of the said debt being paid \* \* \* released Mrs. Ayer from all personal liability of said bond, holding the mortgage only against her interest in the mortgaged premises;" that Gen. Bamberg thereafter assigned the bond and mortgage to John H. Cope, and Cope thereafter assigned them to Paul Kistler Hughes, who now sets them up *pro tanto* against the one-eleventh interest formerly owned by Mrs. Ayer and now owned by her six children; that the other three makers of the bond and mortgage have contributed the payment of their proportion of the mortgage debt.

The fact of suretyship and its legal consequences were not pleaded, but the issue was made by the testimony; it may perhaps be embraced by the plea of no consideration; it was considered by the Court below, and will be considered now.

The only deduction from the testimony is that the boy, T. J. Ayer, bargained for a one-eighth interest in the sawmill business, and his mother in effect, borrowed the money for him. The share of each of the 11 owners of the land

2 was worth at least \$500; there is no proof of the value of the land, but it may be assumed to have been more than \$5,000. Thus valued, the mortgage debt on these five interests, incumbered by the mortgage, was \$360 for each interest. The interest, therefore, of each one of the four Hughes boys was ample security for the debt due by them. There was no need for Mrs. Ayer to be surety for them; when she signed, it was for her son, T. J. Ayer, and no one else; he owned no land. There is not a scintilla of testimony that she signed for the Hughes boys. Mrs. Ayer is dead, but T. J. Ayer is alive, and is a party to this suit,

and he did not deny that his mother signed for him alone. If, therefore, Mrs. Ayer be considered a surety, it was for her son, T. J. Ayer; and, if that be so, she is yet liable to Paul, who owns the bond and mortgage. She is not discharged by Bamberg's release, as contended in the ninth exception. The release was from personal liability, not from the lien of the mortgage.

The release by a mortgagee or payee, or one of the several makers of a bond and mortgage, or the material alteration of the instrument by the payee, will release a surety thereon.

But not so where the release is to and for the surety, 3, 4 and with the surety's consent, as it must have been in this instance. 32 Cyc. 159.

To revert to the proposition laid down, *supra*, the liability of Mrs. Ayer if she signed as surety for her son: In that event she did not stand in any relationship to Paul Kistler Hughes except that of joint and principal maker of a bond and mortgage; Paul Kistler Hughes has paid his *pro rata* of the debt, and the other makers have paid their *pro rata* of the debt; why should Mrs. Ayer's estate not pay its *pro rata* of the debt? If Mrs. Ayer's estate is required now to pay, it may go upon T. J. Ayer for reimbursement, for she was his surety; but her estate has no such claim to go upon the other signers with her, certainly not on Paul; and there is no other suggested ground for her relief. If, then, the estate of Mrs. Ayer be liable on the bond and mortgage, and it is, for what proportion of that debt is it liable? The Circuit Court simply held the estate liable "to the extent of her proportionate share of the mortgage debt," without indicating whether that proportion was one-fifth, as there were five obligors, or less. That issue is made by the tenth, eleventh and thirteenth exceptions.

The contention of appellant is: (1) That in no event is the estate liable for more than one-eighth of the original mortgage debt, for the reason that T. J. Ayer had only one-

eight interest in the sawmill business; (2) that the  
5 liability of the estate ought to be decreased by that  
of another joint obligor, Olivia E. Hughes, who was  
life tenant of the land, and now dead; (3) that the other  
Hughes obligors, William, Richard, and James, did not con-  
tribute their share of the debt; and (4) that the town lot of  
Paul ought to be first applied to the debt before the estate  
of Sarah is held liable.

These contentions will be considered in the inverse order.  
Paul Hughes has done nothing, by contract or otherwise,  
which requires that his own town lot shall relieve his joint  
obligor, Mrs. Ayer. The testimony proves that the  
6 three Hughes obligors, William, Richard, and James,  
all paid to Paul by conveyances their share of the  
bond. The master so found. The sixth obligor, Mrs.  
Olivia Hughes, was mother to the others, and life tenant of  
the land. She is dead. She may be considered out of the  
transaction. The testimony shows nothing to charge or to  
relieve her. Finally, as betwixt the obligors (excepting her  
mother), Mrs. Ayer became bound on the face of the bond  
to pay one-fifth of it. She was surety only for her son;  
she was certainly not surety for Paul. Mrs. Ayer's estate  
is therefore liable to contribute to Paul out of the partition  
money, one-eighth of the bond and mortgage.

The twelfth exception states no new issue.

The judgment of the Circuit Court is therefore modified  
in the respect last mentioned.

8832

## DINKINS v. SIMONS ET AL.

(81 S. E. 688.)

## APPEAL AND ERROR. PRACTICE.

1. Where the Court entered two decrees at different times, but the first decree merely adjudicated the rights of the parties and directed the submission of a formal decree, and the Court retained jurisdiction until such submission, a notice of intention to appeal, served within ten days of notice of filing of the formal decree, was in time, though more than ten days elapsed between the entry of the first decree and the giving of the notice.
2. A judgment granting specific performance of an option contract to purchase real estate, and directing a sale to pay the amount due the vendor, affirmed by an equally divided Court.
3. Testimony of party as to transaction between his father and adverse deceased party admissible to show absolute deed a mortgage.
4. An option must be exercised to affect contract.
5. Objections to complaint not raised by demurrer are waived.
6. In action for specific performance by either vendor or vendee the Court may in its discretion order a sale of property to protect substantial rights of parties.

Before GAGE, J., Columbia, November, 1912. Affirmed.

Action by John D. Dinkins, as executor of A. H. Dinkins, deceased, against W. J. Simons, as committee of Robert J. Palmer, a lunatic, and others. From a judgment for plaintiff, defendants appeal.

*Messrs. Clark & Clark*, for appellants, cite: *Dinkins never acquired equitable title*: 32 S. C. 57. *The contract lacked the essentials of a mortgage*: 78 S. C. 181; 31 S. C. 280-281; 55 S. C. 70-71; 61 S. C. 579; 82 S. C. 558. *Specific performance not of right*: 53 S. C. 572; 70 S. C. 351; 79 S. C. 143. *Objection to testimony of interested party*: 47 S. C. 292; 28 S. C. 73; 64 S. C. 293; 89 S. C. 350. *Receipts insufficient to show alleged contract*: 27 S. C. 363; 13 Rich. 257.

*Messrs. Thomas & Lumpkin*, for respondents, cite: *Time within which to appeal*: 32 S. C. 317. *Interest of plaintiff*:

30 A. & E. Enc. 617; 20 Enc. Pldg. & Prac. 428; 57 N. J. Eq. 257; 26 A. & E. Enc. 125; 53 S. C. 563. *Equitable mortgage*: 11 A. & E. Enc. 123; 4 Kent Com. 150. *Receipts*: 1 Rich. L. 33; 1 Strob. 61; 30 Cyc. 1226. *Costs*: 4 S. C. 70; 44 S. C. 378.

April 28, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This is an action in which the plaintiff seeks the aid of the Court, in the enforcement of an option to purchase a tract of land, under the following agreement:

“State of South Carolina, Richland County.

“This agreement, made this 7th day of February, A. D. 1903, by R. J. Palmer, of the first part, and Ainsley H. Dinkins, of the second part, both of the county and State aforesaid, witnesseth:

“That the party of the first part does hereby lease, demise and to farm let, to the party of the second part, that tract of land, \* \* \* being the land this day sold and conveyed to R. J. Palmer, by the said Ainsley H. Dinkins. This lease to continue from year to year for the term of ten years from this date, provided the rental hereinafter stipulated for is paid regularly, as herein stipulated; but failure to pay any installment of rent when due shall, at the option of the party of the first part, terminate, immediately on the exercise of such option, this said lease.

“The party of the second part hereby stipulates and covenants and agrees, to and with the party of the first part, his heirs, executors, administrators and assigns, to pay to the party of the first part, as rental for said lands above mentioned, the annual sum of one hundred dollars, said rental to be paid on or before December 1st, next, and on or before December 1st of each succeeding year, during the continuance of this lease.

"The party of the first part further covenants to and with the party of the second part to sell and convey to said party of second part the above mentioned and described tract of land at the price of twelve hundred (\$1,200.00) dollars, upon payment to said party of first part of said purchase price, at any time during the continuance in force of this lease; and it is further stipulated by and between the parties hereto that the said Ainsley H. Dinkins, if he chooses to exercise the option to purchase said lands, may make payment to the said R. J. Palmer, from time to time, on his said contract in such sums as he sees fit; and that all payments made by said Dinkins in excess of the yearly rental above stipulated shall be credited on the purchase price above named, but that the yearly rental shall continue as above stipulated, until the purchase money is paid in full and conveyance made for said land, under the terms of foregoing contract.

"In testimony whereof the parties of the first part and second part have hereunto set their hands and seals, to duplicate copies of this contract, the day and year first above written.

R. J. PALMER. (Seal.)

"A. H. DINKINS. (Seal.)

"(In third line from bottom of first page 'twelve' inserted in lieu of 'eleven' and figures '(\$1,200.00)' inserted before signing.)

"Signed, sealed, and delivered in presence of W. H. Collins, D. W. Robinson."

The complaint alleges: That in pursuance of said agreement, Ainsley H. Dinkins went into possession of said land and there remained until his death, on the 21st of April, 1911, leaving of force a last will and testament, wherein he appointed the plaintiff as his executor. That the testator devised and bequeathed all his property, including his rights under the said agreement, to his five children, parties defendant to this action, two of whom are adults, and three are infants of the respective ages of 13, 14, and 17 years.



That the plaintiff is informed and believes that Ainsley H. Dinkins did, from time to time, pay the annual rental, provided for in said agreement. That W. J. Simons was appointed the committee of Robert J. Palmer, who was adjudged a lunatic by the probate Court, on the 4th of February, 1908. The prayer of the complaint was "that the amount due upon the contract of purchase aforesaid be ascertained and determined, and, upon the payment of the same to W. J. Simons, as committee of Robert J. Palmer, that a deed of the said tract of land be executed to the children of Ainsley H. Dinkins, defendants herein. \* \* \*"

The defendants did not set up any matter by way of defense, but merely denied that the plaintiff or his testator had complied with the requirements of the agreement, in regard to the exercise of the option to purchase the land.

There were two decrees. In the first decree his Honor, the Circuit Judge, said: "I think it manifest that the deed from Dinkins to Palmer constituted Palmer a mortgagee of the land. Under the contract, Dinkins has until the 7th of February, 1913, to redeem. \* \* \* I conclude, therefore, that the land in issue must be sold; that out of the proceeds of sale the estate of Palmer must be paid, the balance due to it on rent, after it has been charged with the amount so found to have been paid, and the estate of Palmer must be paid the principal sum of \$1,200 admitted by plaintiff to be due; and, if there be any balance, it shall be divided betwixt the heirs at law of Dinkins, or to the executor of his will, to be paid out according to law. I think the costs ought to be shared equally by the plaintiff and the estate of Palmer; one side is in no more fault than the other." The Circuit Judge filed another decree, in which he found that the balance due for rent on the 1st of December, 1912, was \$582.35, which, together with the \$1,200, aggregated \$1,782.35.

There is a preliminary question to be determined before the merits are considered. Upon the hearing of this case

in the Supreme Court, a motion was made to dismiss the appeal, on the ground that the notice of intention to  
1, 2 appeal was not served within ten days, after notice of the filing of the final decree was served on defendant's attorneys. The first of the decrees was filed on the 28th of January, 1913, and the other on the 25th of March, 1913. The notice of intention to appeal was served on the 28th of March, 1913. At the conclusion of the first decree are these words: "A formal decree may be prepared and submitted to me to sign, and I retain jurisdiction of the case to that end." The second decree commences with the following words: "This cause was heard by me at the November term of the Court of Common Pleas for Richland county. On January 27, 1913, I handed down a decree, in which I determined the rights of the parties, and stated the principles upon which those rights should be settled. I then gave leave for a formal decree to be prepared and submitted to me to sign, and I retained jurisdiction of the case to that end." Both decrees were rendered by his Honor, George W. Gage, at that time a Circuit Judge, but now an Associate Justice of the Supreme Court. It thus conclusively appears that the first decree was not intended to be final; that the Circuit Judge so adjudged; and there was no appeal from his decree in this respect. The motion to dismiss the appeal is therefore refused.

It seems that Ainsley H. Dinkins bought the land in question from W. G. Childs on the 15th of January, 1896, but was not able to pay the purchase money, which amounted to \$1,100, at the time of the transaction between him and Robert J. Palmer.

Frederick Dinkins, one of the defendants, testified as follows: "Mr. Thomas: Did your father owe Mr. Childs any money on it? Witness: Yes, sir. Q. How much? A. \$1,100. Q. Who did your father get to take up Mr. Childs' debt? A. He got Mr. Palmer. Mr. Clark: I object to any testimony bearing on any transaction or communication

between the witness' father and R. J. Palmer, on the grounds stated above. (Testimony taken subject to objection.) Mr. Thomas: Got Mr. Palmer to do what, pay who? Witness: Pay Mr. Childs. Q. Did he give Mr. Palmer a deed? A. Yes, sir. Q. Your father? A. Yes, sir. Mr. Clark: I object to that; the deed speaks for itself. Mr. Thomas: The deed is offered in evidence. Mr. Thomas: Did your father and his children, his family rather—did your father and his family remain in possession of the land after your father gave Palmer the deed? Witness: Yes, sir. Q. Had you lived there before that time? A. Yes, sir; we lived there when Mr. Childs— Q. First sold it to your father? A. Yes, sir. Mr. Clark: I object to that testimony; same grounds. Mr. Thomas: And your father was living there when he died? A. Yes, sir.

The appellant's attorneys interposed two objections to this testimony. The first ground of objection was that it was inadmissible under section 438 of the Code. It did not relate to a transaction between the witness and a person then deceased, and furthermore was not in his favor, but was against the interest of the witness. See cases cited in the notes to section 438 of the Code, on page 166, to which may be added the case of *Devereux v. McCrady*, 46 S. C. 133, 24 S. E. 77. The second ground of objection was that it tended to contradict the deed.

Parol testimony is admissible for the purpose of showing that an instrument of writing purporting to be an absolute deed, was intended as a mortgage. *Brownlee v. Martin*, 21 S. C. 392. This testimony, however, is immaterial, and need not be discussed.

The agreement hereinbefore mentioned shows upon its face: (1) That the parties intended to provide for a lease. (2) That Ainsley H. Dinkins was empowered to exercise the option to purchase the lands at any time during the continuance in force of the lease. (3) That failure on the part of Ainsley H. Dinkins to pay any installment of rent when

due should, at the option of Robert J. Palmer, terminate the lease immediately, on the exercise of such option.

Robert J. Palmer was powerless to exercise his option, unless there was a failure to pay the installments of rents when due, and even then it was necessary to give notice that he had elected to exercise his option, in order to terminate the lease. The mere failure of Dinkins to pay an installment of rent did not *ipso facto* have that effect. Furthermore, the right of Palmer to exercise his option to terminate the lease, upon the failure of Dinkins to pay the rent, was subject to waiver; and the following testimony shows that it was not the intention, either of Palmer or his committee, to terminate the lease.

W. J. Simons testified as follows, on cross-examination: "Q. Where is Palmer now? A. In the city of Columbia. Q. You are still handling his affairs for him? A. Yes, sir; I can state that prior to the time I took charge, when the old man was considered in good mind, he would get after Dinkins about the short payments he would make, and the old man reminded him of the contract. He reminded him more than once that he had violated it. Q. You then allowed him to stay on? A. Yes, sir; the old man said that Dinkins was so far behind with him that, in self-defense, he would have to help him, hoping to get his money. \* \* \* Q. When you took possession of the property in question, you say you told the Dinkins boy to stay in charge until you gave him further orders? A. Yes, sir."

After the commencement of this action, the defendant, W. J. Simons, served a notice on the plaintiff, which, after reciting the provisions of the agreement and the fact that Dinkins had failed to pay the rent therein stipulated, concluded as follows: "Now, therefore, in pursuance of said covenant, hereinbefore set forth, I hereby give you notice to quit and deliver up to me immediately the premises hereinbefore described, now held by you as my tenant; and demand is hereby made for all installments of rent now due and

owing, together with interest accrued thereon, from the 7th day of February, 1903, to date. Dated this — day of August, 1911. W. J. Simons, as committe of R. J. Palmer, a lunatic."

On the 21st of October, 1911, W. J. Simons executed the following receipt: "Columbia, S. C., October 21, 1911. Received of John D. Dinkins, executor of the estate of H. Dinkins, one hundred and no one hundredths dollars for rent of land of R. J. Palmer, on Garners Ferry road, for the year 1911. W. J. Simons, committee of R. J. Palmer, a lunatic."

There can be no doubt that Dinkins exercised the option to purchase, within the ten years and during the continuance of the lease, as this action (which showed that he intended to exercise such option) was commenced on the 3d of August, 1911.

There is not a particle of testimony tending to show that Dinkins was guilty of laches in exercising his option, as he had that right, under the contract, at any time within ten years and during the continuance of the lease, which was continued of force after there was a failure to pay rent, by acquiescence of Palmer and his committee. Laches cannot be imputed to a person who acts within the time prescribed by the terms of the contract. It would be in effect making a contract for the parties for the Court to hold that the right to exercise the option of purchasing the land by Dinkins was forfeited under these circumstances. It is contended that, this being an action for specific performance, the complaint should be dismissed, for the reason that it does not appear that the plaintiff is ready and willing to purchase the land. If the complaint was defective on the ground that it did not state facts sufficient to constitute a cause of action, a demurrer should have been interposed, otherwise such objection was waived. It is also contended that the Circuit Judge erred in ordering a sale of the property.

The rights of the vendor and vendee for enforcement of the contract are practically the same, and the Court, in the exercise of a wise discretion, may order a sale of the property, whether the action for specific performance was brought by the vendor or by the vendee. *Gregorie v. Bulow*, Rich. Eq. Cas. 235; *Walker & Trenholm v. Kee*, 16 S. C. 76; *Peake v. Young*, 40 S. C. 41, 18 S. E. 237; *Blackwell v. Ryan*, 21 S. C. 112; *Good v. Jarrard*, 93 S. C. 229, 76 S. E. 698, 43 L. R. A. (N. S.) 383; *Whitmire v. Boyd*, 53 S. C. 315, 31 S. E. 306.

"Where equity has once acquired jurisdiction, by reason of the claim for specific performance, it may retain jurisdiction and proceed to a complete adjudication, even to the extent of establishing legal rights. Thus, in addition to decreeing specific performance the Court may give judgment for possession." 20 Enc. Pl. & Pr. 479, 480.

"On a bill by a vendor against a vendee, the sale of the latter's equitable estate in the land may be ordered to satisfy the unpaid purchase price, and a judgment against any deficiency may be entered against the defendant, but it is not a matter of course to direct a sale, and the Court may simply foreclose the vendor's right of purchase." *Id.* 481.

"Where specific performance of an agreement is impracticable, the plaintiff may have approximate relief, in some other form, which will secure to him the substantial advantages of his contract. The Court is bound to see that it does that complete justice at which it aims, and which is the ground of its jurisdiction." *Id.* 479.

The exceptions raising other questions are overruled, for the reasons stated by his Honor, the Circuit Judge.

Judgment affirmed.

MR. JUSTICE FRASER concurs with the Chief Justice.

MR. JUSTICE HYDRICK, *dissenting*. The plaintiff states his cause of action in his complaint as follows:

(1) "That on the 7th day of February, 1903, Robert J. Palmer and Ainsley H. Dinkins entered into an agreement

under seal whereby the said Robert J. Palmer leased to said Ainsley H. Dinkins all that piece, parcel and tract of land (describing it), being the same land conveyed by said Ainsley H. Dinkins to said Robert J. Palmer by deed dated February 6, 1903, and recorded in clerk's office, Richland county, in Deed Book AH, p. 222; that the said agreement provided that the said lease should continue from year to year for the term of ten years from the date thereof, and that the said Ainsley H. Dinkins, his heirs, executors, administrators, and assigns, should pay to the said Robert J. Palmer the annual sum of \$100 as rental for said land; and in said agreement the said Robert J. Palmer covenanted and agreed with the said Ainsley H. Dinkins to sell and convey to him the said tract of land at the price of \$1,200 at any time during the continuance of said lease; that, in pursuance of said agreement, the said Ainsley H. Dinkins went into possession of said tract of land and remained in possession of same until his death, as hereinafter set forth, and, as plaintiff is informed and believes, did, from time to time, pay the annual rental provided for in said agreement."

(2) Alleges the lunacy of Palmer and the appointment of Simons as his committee.

(3) Alleges the death of Dinkins, leaving a will of which plaintiff is executor.

(4) "That in and by the terms of said will the testator devised and bequeathed all of his property, both real and personal, including all of his rights under the aforesaid agreement with Robert J. Palmer, whereby the said testator acquired a lease upon the tract of land above described, together with an option to purchase the same, to his five children, their heirs and assigns, share and share alike; and said testator, in said will, authorized and empowered his executor to take all proper and necessary steps to comply with the terms and provisions of the aforesaid agreement, and to complete the purchase of the said tract of land for the use and benefit of testator's children, with the power to institute or prosecute all necessary suits and proceedings in the

premises, and with full power and authority to execute any mortgage or mortgages to secure the payment of such sum or sums as may be necessary to comply with the purchase of the said tract of land."

(5) Alleges that the defendants, other than Simons, are the children and devisees of Dinkins, and that some of them are infants.

(6) Alleges that the estate of Dinkins is in debt, and that it will be necessary to mortgage the personal property of the estate and the crops growing on the land to raise funds to make and gather the crops and support testator's children.

The prayer of the complaint is as follows:

"(1) That the amount due upon the contract of purchase aforesaid be ascertained and determined, and upon the payment of the same to W. J. Simons, as committee of Robert J. Palmer, that a deed of the said tract of land be executed to the children of Ainsley H. Dinkins, defendants herein.

"(2) That the plaintiff, as executor, be authorized and empowered, upon the execution and delivery of the deed aforesaid, to mortgage the said tract of land for the purpose of raising such an amount as will pay the sum found to be due thereon, and also such amount or amounts as may be necessary to pay off and discharge the claims and obligations of the estate, and the costs and expenses of this action; and that the plaintiff, as executor, also be authorized to mortgage the agricultural crops for the current year upon said tract of land, or, if necessary, to mortgage the personalty of said estate, in order to pay for the making and gathering of said crop and for the support of testator's children.

"(3) For such other and further relief as may be just and necessary, and for the costs of this action."

The answer of Simons admits the allegations of paragraph 2 of the complaint, and denies all others, and sets out as an exhibit thereto, a copy of the agreement referred to in paragraph 1 of the complaint, which reads as follows: "This agreement made this 7th day of February, A. D. 1903, by R. J. Palmer, on the first part, and Ainsley H. Din-



kins, of the second part, both of the county and state aforesaid, witnesseth: That the party of the first part does hereby lease, demise and to farm let to the party of the second part that tract of land (describing it), being the land this day sold and conveyed to R. J. Palmer by the said Ainsley H. Dinkins. This lease to continue from year to year for the term of ten years from this day, provided the rental hereinafter stipulated for is paid regularly, as herein stipulated; but failure to pay any installment of rent when due shall, at the option of the party of the first part, terminate immediately on the exercise of such option, this said lease. The party of the second part hereby stipulates and covenants and agrees, to and with the party of the first part, his heirs, executors, administrators, and assigns, to pay to the party of the first part, as rental for said lands above mentioned, the annual sum of one hundred dollars, said rental to be paid on or before December 1st next, and on or before December 1st of each succeeding year, during the continuance of this lease. The party of the first part further covenants to and with the party of the second part to sell and convey to said party of the second part the above mentioned and described tract of land at the price of twelve hundred dollars, upon payment by said party of first part of said purchase price, at any time during the continuance in force of this lease; and it is further stipulated by and between the parties hereto that the said Ainsley H. Dinkins, if he chooses to exercise the option to purchase said lands, may make payments to the said R. J. Palmer from time to time on his said contract in such sums as he sees fit; and that all payments made by said Dinkins in excess of the yearly rental above stipulated shall be credited on the purchase price above named, but that the yearly rental shall continue as above stipulated until the purchase money is paid in full and conveyance made for said land, under the terms of the foregoing contract."

The Court held that the deed from Dinkins to Palmer and the contract above set out constituted Palmer a mort-

gagee of the land, and that this was an action to redeem. It found that no part of the principal of \$1,200 due by the estate of Dinkins had been paid, and, after allowing all proper credits, that there is still due \$582.35 on the rent stipulated for in the contract, and adjudged that the land be sold, and out of the proceeds, after paying the fees and costs and expenses of sale, the balance due as rent and the principal sum of \$1,200 be paid to Simons, as committee of Palmer, and the balance, if any, be divided among the heirs of Dinkins or be paid to his executors, and that the costs should be paid equally by plaintiff and the estate of Palmer, as one side was no more at fault than the other. From this decree, Simons appealed.

A preliminary question to be decided is whether notice of appeal was served in time. There were two decrees. The first decided the issues of law and fact and the rights of the parties thereunder. This decree was filed January 28, 1913, and notice of the filing thereof was served upon defendant's attorneys, and notice of appeal was not served within ten days thereafter. But, at the foot of this decree, the Judge directed that a formal decree be prepared and submitted to him, and expressly retained jurisdiction of the cause until that could be done. The formal decree was filed March 25, 1913, and notice of appeal was served March 28th, within ten days thereafter, and was therefore in time, as the first decree was not intended to be final.

The contract between Dinkins and Palmer is too plain to require construction. Upon its face, no other construction can be given it than that the parties intended an absolute and unconditional conveyance of the land by Dinkins to Palmer, and a lease thereof by Palmer to Dinkins, with the option to purchase it at any time during the continuance of the lease, and, upon payment of the agreed price, to have a reconveyance thereof. There is not a particle of extrinsic evidence tending to show any other intention; there is evidence that Dinkins bought the land from Childs and

owed him for it, and that Palmer paid Dinkins' debt to Childs; but there is no evidence that he took an assignment of the debt. The payment by Palmer of Dinkins' debt to Childs was no doubt the consideration of the deed of Dinkins to Palmer. There is no evidence of any existing debt of Dinkins to Palmer, which would be necessary to make the transaction a mortgage. *Hodge v. Weeks*, 31 S. C. 281, 9 S. E. 953. The testimony of Mr. John P. Thomas, the attorney who was consulted by Dinkins, shows clearly that Dinkins understood the transaction as a sale and lease with option to buy. Throughout his testimony he refers to the paper as a lease and contract of purchase. In his will, which was written by Mr. Thomas, Dinkins refers to it as a contract "whereby I have acquired a lease upon certain premises in Richland county, together with an option to purchase same," and authorizes his executor to take the steps necessary to comply with the terms of the contract and "complete the purchase of the land herein described." By reference to the complaint, it will be seen that the action is predicated upon the theory that the transaction was a conveyance, lease, and contract to purchase. It is there alleged that the land was conveyed by Dinkins to Palmer; that Palmer leased it to Dinkins, with the option to purchase; and that Dinkins went into possession in pursuance of said agreement. Nowhere, either in the written instruments, in the testimony, or in the complaint, is there the slightest intimation that the transaction was intended as a mortgage.

The facts of the case bring it so clearly within the principles of previous decisions of this Court that it is only necessary to refer to them to show that the transaction cannot be held to be a mortgage without overturning the principles decided in those cases. *Brown v. Bank*, 55 S. C. 70, 32 S. E. 816; *Creswell v. Smith*, 61 S. C. 575, 39 S. E. 757; *Ray v. Counts*, 82 S. C. 555, 64 S. E. 1135; *Williams v. McManus*, 90 S. C. 490, 73 S. E. 1038. In each of these cases there was evidence tending to show that the transaction

in question was intended to be a mortgage, while, in this case, there is none. In *Williams v. McManus* the Court said: "While it is undoubtedly true that a deed which appears on its face to be an absolute conveyance may in equity be declared a mortgage if the evidence be sufficient to show that such was the intention of the parties, yet it is equally true that the presumption is that the deed is, what on its face it purports to be, an absolute conveyance, and, to establish its character as a mortgage, the evidence must be clear, unequivocal, and convincing, for otherwise the natural presumption will prevail." These authorities show that the Circuit Court erred in holding that Palmer was a mortgagee.

The complaint shows that the action is one for specific performance, and not an action to redeem, and the Court erred in treating it as an action to redeem. *Sims v. Steadman*, 62 S. C. 300, 40 S. E. 677; *Francis v. Francis*, 78 S. C. 181, 58 S. E. 804.

There is no testimony that Dinkins ever notified Palmer, or his committee, that he intended to exercise his option to purchase. He could have availed himself of it, or not, as he saw fit. At no time could Palmer or his committee have brought suit against him for specific performance, because he had neither exercised the option nor expressed any intention of doing so. Therefore it cannot be said that, at any time prior to the commencement of this action, Dinkins owed Palmer anything on the purchase price of the land. But the commencement of the action during the continuance of the lease would have been a sufficient acceptance of the option to entitle Dinkins' executor and the beneficiaries under his will to specific performance of the contract, if the plaintiff had shown that he was ready and willing and able to perform. Dinkins' death, the minority of some of his children, and the lunacy of Palmer are sufficient in equity to excuse the failure to tender performance before action brought, since Palmer's misfortune made it impossible for

him to execute a deed, if payment of the purchase price had been tendered, and since his committee could not have done so, without the order of the Court. Even in that event the Court would not have decreed specific performance, except upon payment of the balance found to be due to Palmer by Dinkins for rent, on the principle that he who seeks equity must do equity. *Lake v. Shumate*, 20 S. C. 23.

The rule is well settled that, in actions for specific performance, "plaintiff must show performance or ability, readiness, and willingness to perform all the provisions of the contract to be performed by him. Save in the exceptional case of immaterial default admitting of compensation, relief must be denied to a plaintiff who is unable to perform his part of the contract." 36 Cyc. 693; 26 A. & E. Enc. L. (2d ed.) 42.

In *Davenport v. Latimer*, 53 S. C. 572, 31 S. E. 633, after finding that there was no evidence of tender of performance by plaintiff, or of readiness and willingness and ability to perform, the Court said: "Specific performance is not a matter of absolute right, but rests in the sound judicial discretion of the Court, guided by established principles. Generally a vendee cannot maintain an action against a vendor for specific performance of a contract to sell land, unless he shows that he has complied, or offered to comply, with the contract on his part, and was refused by the vendor. But, since equity leans to compensation in preference to forfeiture, the vendee, if he cannot show exact compliance with the contract on his part, may still have specific performance or compensation, provided he is not guilty of laches in the assertion of his claim, stands ready and willing to comply, and shows reasons satisfactory to the Court in excuse of his failure to comply. Plaintiffs have not brought themselves within this principle, for, as stated, they have not complied, or offered to comply, and have shown no reason in excuse of their default, even if it be conceded that an action brought

two years after default on the contract is not laches under the circumstances of this case." See, also, *Moseley v. Witt*, 79 S. C. 143, 60 S. E. 520, where the Court said: "There is no evidence whatever that the plaintiff has paid or offered to pay the entire purchase money, and under the contract he was not entitled to a conveyance until the whole of the purchase money should be paid. Indeed, he could not compel defendant to accept payment until the whole became due. The plaintiff's action would necessarily fail on this ground."

In the case at bar the plaintiff not only failed to show readiness, willingness, and ability to perform, but, on the contrary, the allegations of his complaint show beyond doubt that he was not able to perform, except by mortgaging the land to raise the money to pay for it, which, of course, he could not do, because he did not have the legal or equitable title.

The proposition that, in an action like this by the vendee against the vendor for the specific performance of a contract of sale, where there is no complication of equities, the Court should order the land sold to pay the purchase price out of the proceeds is too untenable for discussion. That would not be specific performance of the contract which the parties made, but would be the making of an entirely different contract for them, and enforcing it in a manner not contemplated by them. The vendor agreed to part with his title only upon payment of the purchase price. But, if the Court orders a sale of the land, the purchaser at such sale will acquire the title, even though it should bring much less than the price which the vendor agreed to take and the vendee agreed to pay. No authority sanctioning such a course has been cited, and I dare say none can be found. In such actions by the vendor against the vendee, and perhaps, also, in some actions by vendee against vendor, where the equities are so complicated that a sale is necessary to effect

the intention of the parties, a sale may be ordered. But this case presents no such features.

The judgment should be reversed.

MR. JUSTICE WATTS concurs in the dissenting opinion of MR. JUSTICE HYDRICK.

The Supreme Court being equally divided, the judgment of the Circuit Court is affirmed.

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8833

GILL *ET AL.* *v.* RUGGLES.

(81 S. E. 519.)

TRIAL. EVIDENCE. APPEAL. DISPOSITION OF CASE. EXCEPTIONS.

1. Where it appears from the exceptions that the trial Court and the attorneys understood that the objection to a certain line of testimony was to continue throughout the trial, it was not necessary to repeat the objection every time similar evidence was offered.
2. Where the defendant, by a written contract, agreed to purchase certain land for a named sum, and thereafter to convey it to a corporation to be formed by the parties to the contract in exchange for a proportion of the preferred stock of the company, the amount of which stock was to depend upon the consideration paid for the land and the improvements made thereon, which were to be paid for by defendant, the amount of consideration was contractual, and not merely inserted in the contract by way of recital, and parol evidence to vary such amount was inadmissible.
3. Testimony by the plaintiffs that they had paid a part of the purchase price of certain lands which the defendant had agreed to pay was admissible, where such payment was alleged in the complaint, even though it was not alleged that the payment was made at defendant's request or ratified by him, since objection to testimony tending to prove allegations made is not a proper method of questioning the sufficiency of the complaint.
4. An exception to the admission of irrelevant evidence will be overruled, without determining whether such ruling was erroneous, where it does not appear that the ruling was prejudicial to appellant.
5. Exceptions to the refusal to direct a verdict cannot be sustained, even though the testimony tending to prove the allegations of the complaint was erroneously ruled to be competent.

REP.]

November Term, 1918.

6. Upon appeal from such erroneous rulings a new trial will be granted; but the Supreme Court will not order a nonsuit.
7. Exceptions which refer to facts to be found elsewhere than in the exceptions themselves are insufficient in form, and cannot be considered.

Before M. L. BONHAM, special Judge, Marion, November, 1912. Reversed.

Action by Charles E. Gill and others against Charles F. Ruggles. Judgment for plaintiffs, defendant appeals.

The material paragraphs of the first cause of action were as follows: "Third. That at Marion, in the county of Marion, in the State of South Carolina, during the month of December, 1908, the defendant, Charles F. Ruggles, agreed and contracted to purchase from the Midland Timber Company and Southern Land & Timber Company certain timber and timbered lands, situate in said county of Marion and State of South Carolina, at and for the sum of \$400,000.

"Fourth. That at said time and place, preliminary to said purchase, the defendant herein agreed and contracted with these plaintiffs and with one R. C. Libbey to advance \$375,000 of said sum, and, if these plaintiffs, with R. C. Libbey, would agree to secure \$25,000 of said purchase price for the defendant, that he, the said defendant, would assume and pay said indebtedness.

"Fifth. That, in accordance with said agreement, on the 24th day of December, A. D. 1908, the defendants herein paid to said timber companies said sum of \$375,000, and these plaintiffs, with one R. C. Libbey, executed and delivered to said timber companies their promissory notes, in writing, whereby they jointly and severally contracted to pay to said timber companies said sum of \$25,000 six months from said 24th day of December, 1908, with interest



at the rate of six per centum per annum, with the privilege, however, of renewing same at maturity.

"Sixth. That, in accordance with said agreement of purchase, the said timber companies conveyed to said Charles F. Ruggles the timber and timbered lands theretofore agreed upon. That, at and before the execution of said notes by these plaintiffs and R. C. Libbey, the defendant, Charles F. Ruggles, for value received, agreed and contracted with these plaintiffs and R. C. Libbey to assume and pay said notes when due, as aforesaid, which said notes were given as part consideration for the timber then conveyed to said Charles F. Ruggles.

"Seventh. That, although said notes have been renewed from time to time by these defendants and said R. C. Libbey, and are now long past due, and suit has been instituted against these plaintiffs, jointly and severally, to enforce the payment of said notes, yet the defendant has paid no part of same, and has failed and refused upon demand to pay same, or a part thereof."

The material paragraphs of the second cause of action were:

"Third. That at Marion, in the county of Marion, in the State of South Carolina, during the month of December, 1908, the defendant, Charles F. Ruggles, agreed and contracted to purchase from the Midland Timber Company and Southern Land & Timber Company certain timber and timbered lands, situate in said county of Marion and State of South Carolina.

"Fourth. That for the benefit and with the knowledge of the said Charles F. Ruggles, these plaintiffs paid to said timber companies the sum of \$25,000 on the purchase price of said timber and timberland, and said timber companies on the 24th day of December, 1908, duly conveyed the said timber and timberlands to the said Charles F. Ruggles; and he thereby became seised in fee and possessed of said timber and timberlands.

"Fifth. That these plaintiffs have received no benefit whatever from the sum so paid to said timber companies for the exclusive benefit of the defendant, Charles F. Ruggles.

"Sixth. That the said Charles F. Ruggles received the benefit of said sum of \$25,000 so paid by plaintiffs, has failed and refused to repay the same, and is now due and owing these plaintiffs said sum of \$25,000, with interest from said date."

Defendant introduced the following agreement:

"Supplemental agreement, made and entered into this 23d day of December, 1908, between Charles E. Gill, of Wausau, Wisconsin; Charles H. Leib, of Minneapolis, Minnesota, and Charles F. Ruggles, of Milwaukee, Wisconsin, witnesseth:

"Whereas, These parties entered into an agreement under date of August 10, 1908, looking towards the acquisition of certain timberlands and timber rights in the State of South Carolina, and providing for financing the purchase and operation thereof on certain contingencies; and,

"Whereas, Since the said date the said timber had been examined, and the owners of said timber and said timberlands and rights have now agreed to sell the same to these parties, including certain other timbers in the vicinity, estimated to contain approximately thirty million (30,000,000) feet of timber, for the sum of three hundred and seventy-five thousand (\$375,000) dollars cash; and,

"Whereas, The said Ruggles, on the conditions herein named, has agreed to furnish such money and perfect the said purchase:

"Now, therefore, this agreement witnesseth, that the Wisconsin-Carolina Lumber Company, mentioned in the said contract of August 10, 1908, having relinquished all of its rights to purchase the said timber and timberlands and rights to the said Gill, that the said Gill hereby surrenders and assigns all right to purchase the said timber, timberlands,

and rights in the same to the said Ruggles, and the said Ruggles agrees to pay the said consideration of three hundred and seventy-five thousand dollars and take the title to said property, and these parties shall thereupon proceed to the organization of a corporation under the laws of the State of South Carolina, and in such organization provide for two classes of stock, preferred and common. The preferred stock in such organization shall be issued bearing 6 per cent. per annum cumulative dividends to cover the cash investment in said property and in any improvements that may be made thereon in the way of manufacturing plants, etc., for which the said Ruggles shall furnish the money, as hereinbefore stated. There shall be an issue of common stock in such amount as shall be agreed upon as convenient, which common stock in said organization will represent all of the net profits thereof, and the same shall be divided between these parties as follows: To the said Ruggles and to his nominees, sixty (60%) per cent. thereof, and to the said Gill and Leib and their nominees, forty (40%) per cent. thereof.

“In the said Wisconsin & Carolina Company, which has relinquished its rights, the said Gill and said Leib, H. S. Wunderlich, R. C. Libbey, and some others were interested and put in certain sums of money, with the exception of said Libbey, who put in certain sawmill property. The said Libbey and Wunderlich are to be engaged in the active operation of the manufacturing plant which is to be erected by the corporation to be organized, as provided in this agreement, until their services in that behalf are terminated by the corporation, and the said Gill and said Leib agree that they shall be so engaged and so serve the corporation, but neither they nor any of the parties to this agreement shall receive any salary or draw any money for living expenses or personal expenses, other than for expenses incurred in the conduct of the business of the corporation, and whatever moneys are advanced to any of said parties, including the

said Libbey and Wunderlich for living expenses, shall be charged to them on the books of the corporation and interest at the rate of 6 per cent. accumulative thereon, all of said parties receiving such benefits and profits as they will derive through being interested in the distribution of the common stock of the said corporation, in full satisfaction of any interests they had in the said Wisconsin-Carolina Lumber Company, and in full compensation for the services they are to render to the new corporation.

"The said corporation shall be so organized that these parties shall co-operate together for the good thereof, and for their mutual good, and the said Gill and said Leib shall devote themselves to the active work of the conduct of the business of said corporation as long as they shall remain in managerial positions therein, and shall use their best endeavors to carry through to a successful termination the undertaking and enterprise involved in the manufacture and sale of said timber and the products thereof.

"As before, it is now contemplated that a manufacturing plant adequate and appropriate to the business shall be constructed and put in operation upon the premises on the site already provided for, without further delay, and as soon as practicable in the due course of business, and the said Ruggles has agreed and does hereby agree to furnish funds for the construction of such plant and the conduct of the business at a working capital up to and not to exceed the sum of one hundred and fifty thousand (\$150,000) dollars, for which preferred stock in said corporation shall be issued, the same as the initial investment in said property. Said amount shall be made available from time to time, as required, and paid out according to such system of business that may be adopted in the conduct of such undertaking.

"Upon the organization of such corporation, said Ruggles will convey the said property over to it, and the said stock therein shall be issued and divided in accordance herewith.

"In witness whereof, the parties hereto have hereunto set their hands and seals all the day and year first above written.

"(Signed) CHARLES E. GILL. (Seal.)

"(Signed) CHARLES H. LEIB. (Seal.)

"(Signed) CHARLES F. RUGGLES. (Seal.)

"In the presence of:

"(Signed) Chester B. Wright,

"(Signed) John H. Rademaker."

The exceptions upon which the defendant based his appeal were as follows:

"I. Because his Honor erred, it is respectfully submitted, in allowing the plaintiffs, Charles E. Gill and H. S. Wunderlich, to testify, over the objection of the defendant, as to negotiations with the defendant at Marion, S. C., relative to the purchase of certain property mentioned in the complaint, at a date prior to December 23, 1908, on the ground that all such negotiations were subsequently merged into a written agreement bearing date December 23, 1908, and in refusing to strike out said testimony on motion of the defendant on the same ground.

"II. Because his Honor erred, it is respectfully submitted, in allowing the plaintiffs, Charles E. Gill and H. S. Wunderlich, to testify, over the objection of the defendant, as to negotiations with the defendant at Marion, S. C., regarding the property mentioned in the complaint, at a time prior to December 23, 1908, on the ground that the same tended to contradict and vary the terms of a written instrument bearing date December 23, 1908, introduced in evidence, and in refusing to strike out the said testimony on motion of the defendant on the same ground.

"III. Because his Honor erred, it is respectfully submitted, in allowing the plaintiffs, Charles E. Gill and H. S. Wunderlich, to testify, over the objection of the defendant, as to negotiations with the defendant at Duluth, Minn., at and before the execution and delivery of a written instru-

REP.]

November Term, 1918.

ment bearing date December 23, 1908, on the ground that the said testimony tends to contradict and vary the terms of the said written instrument, and in refusing to strike out the said testimony on motion of the defendant on the same ground.

"IV. Because his Honor erred, it is respectfully submitted, in allowing the plaintiffs, Charles E. Gill and H. S. Wunderlich, to testify, over the defendant's objection, that they gave their notes to the timber companies mentioned in the complaint in part payment for the property therein mentioned, in that there is no allegation in the second cause of action set forth in the complaint as amended that the alleged payment by the plaintiffs was made at the request of the defendant, or that he subsequently ratified the same, and in refusing to strike out the said testimony on motion of the defendant on the same ground.

"V. Because his honor erred, it is respectfully submitted, in allowing the plaintiff, H. S. Wunderlich, to testify in reply, as set forth below, over the defendant's objection, in that the said testimony was not in reply to any evidence offered by the defendant, and in that the said testimony was not relevant to any issue in the case, and in that the defendant was prejudiced by the admission of the said testimony. The said testimony is as follows: 'Q. Mr. Wunderlich, is the Southern Carolina Lumber Company now in operation? A. They are not. Q. Who owned, if you know, of your own knowledge, the controlling interest in that corporation? \* \* \* Q. Who owned at the time that mill was shut down the controlling stock in that corporation? A. Charles F. Ruggles. \* \* \* Q. Do you know of your own knowledge who owned the majority of the stock of the Southern Carolina Lumber Company when it was shut down? A. I do. Q. Mr. Wunderlich, were you manager of that corporation during the last year of its existence? A. I was. \* \* \* Q. Mr. Wunderlich, did the Southern Carolina Lumber Company, in the last year of its operation, make money? A.

Yes. \* \* \* Q. Mr. Wunderlich, were the property and assets of the Southern Carolina Lumber Company sold?

\* \* \* Q. Answer the question. A. They were. \* \* \*

Q. Did you get anything for the sale of that property? A.

I did not. \* \* \* Q. Mr. Wunderlich, since the purchase of these lands and timber by Mr. Ruggles, has lumber and timberlands advanced in value? A. It has. \* \* \*

“VI. Because his Honor erred, it is respectfully submitted, in refusing to direct a verdict in favor of the defendant on the grounds set forth in the motion of the defendant, as shown by the record.

“VII. Because his Honor erred, it is respectfully submitted, in refusing the defendant’s motion for the direction of a verdict in his favor, made after his Honor permitted the plaintiffs to amend their second cause of action, on the ground that there is no allegation in the second cause of action as amended that plaintiffs paid to the timber companies the amounts alleged at the request of the defendant, nor is there any allegation that he subsequently ratified or affirmed such payment.

“VIII. Because his Honor erred, it is respectfully submitted, in charging the second request of plaintiffs, as signified by him, in that the said request was not applicable to any of the issues in the case, for the reason that the first cause of action set forth in the complaint is based upon an express promise, and the second cause of action is for money paid, while said request purports to state the law applicable to a cause of action for money or property had and received, and the charging of such inapplicable and irrelevant proposition of law was highly prejudicial to the defendant.

“IX. Because his Honor erred, it is respectfully submitted, in refusing to charge the defendant’s second request to charge as to the second cause of action set forth in the complaint, in that the defendant would not be liable under the said second cause of action, unless the notes in question were given at his request, or unless he subsequently ratified

the giving of the said notes, because a voluntary payment, even if made for his benefit, would not render him liable.

"X. Because his Honor erred, it is respectfully submitted, in refusing to charge the defendant's third request to charge, in that the same contains a correct proposition of law applicable to the issues in the case, and stated no facts except those admitted by the plaintiffs.

"XI. Because his Honor erred, it is respectfully submitted, in refusing to charge defendant's fifth request to charge, in that the same contains a correct proposition of law applicable to the issues in the case.

"XII. Because his Honor erred, it is respectfully submitted, in refusing defendant's motion for a new trial, on the grounds set forth in such motion, as shown by the record."

*Messrs. Washburn, Bailey & Mitchell and W. F. Stackhouse, for appellant, cite: Where the consideration of a contract is contractual in its nature, the general rule applies that it cannot be varied, added to or contradicted by parol extrinsic evidence: 17 Cyc. 656, 657, 659; 24 N. E. 371; 72 Miss. 932; 30 L. R. A. 441; 58 Miss. 537; 31 S. W. 843; 22 N. E. 737; 56 Pac. 1; 47 Minn. 367; 50 N. W. 245; 70 N. W. 575; 3 S. E. 511; 110 S. W. 622; 21 So. 655; 62 S. E. 510; 80 N. E. 479; 104 Minn. 370; 116 N. W. 925; 46 S. C. 372, 411; 79 S. C. 134; 81 S. C. 114; 82 S. C. 411; 83 S. C. 204; 84 S. C. 410. Under the second alleged cause of action no cause of action was alleged or proved for money "had and received." None was alleged or proved for "money paid." Resulting trusts: 56 S. C. 78; 70 S. C. 344, 356; 73 S. E. 1029. Facts do not authorize recovery on implied promise: 33 S. C. 140, 141; 3 Strob. L. 530; 1 Strob. 258; 3 Brev., \*page 380 (p. 462). Action for money paid: 62 Pac. 283; 14 Enc. Pl. & Pa. 53; 136 Mass. 15; 70 N. E. 202; 38 W. Va. 390; 23 L. R. A. 120; 115 N. W. 1072; 16 L. R. A. (N. S.) 233; 127 S. W. 111; 92 N. E. 507; 134 S. W. 1103. Measure of recovery: 124 Mass. 479; 80 Pac.*



1027; 116 Mass. 416; 51 N. Y. 583. *Right of action between surety and principal*: 53 N. E. 815; 11 S. C. 110; 40 So. 53.

*Messrs. Shand, Benet, Shand & McGowan*, also for appellant.

*Messrs. Willcox & Willcox, Henry E. Davis and Henry Buck*, for respondent, cite: *Exceptions defective*: 51 S. C. 55; 52 S. C. 166, 472; 59 S. C. 1; 95 S. C. 90, 382. *Objection not passed upon by trial Court*: 60 S. C. 14; 59 S. C. 243; 53 S. C. 80. *Objection not made*: 83 S. C. 62. *Irrelevant testimony*: 78 S. C. 36. *Parol evidence admissible to show true consideration of contract*: 26 S. C. 304; 58 S. C. 284; 85 S. C. 199; 41 S. C. 153; 40 S. C. 146; 56 S. C. 252; 89 S. C. 256. *Parol testimony to show entire contract*: 27 S. C. 376; 61 S. C. 166; 26 S. C. 312; 53 S. C. 547; 85 S. C. 486; 92 S. C. 226; 79 S. C. 459; 89 S. C. 73; 89 S. C. 415; 57 S. C. 60; 66 S. C. 61; 90 S. C. 454. *Rescission of written contract by parol*: 79 S. C. 141; 73 S. C. 241. *Error in admission of irrelevant testimony harmless*: 83 S. C. 287. *Exception too general*: 51 S. C. 55. *Ratification of payment*: 73 S. C. 83; 27 Cyc. 838; 84 S. C. 263. *Objections not urged on Circuit waived*: 75 S. C. 74, 201; 87 S. C. 18; 88 S. C. 281; 89 S. C. 378; 90 S. C. 470. *Objection insufficient*: 60 S. C. 67; 63 S. C. 1. *Exception indefinite*: 90 S. C. 470. *Motion to strike out testimony*: 52 S. C. 281; 94 S. C. 406. *Evidence in action for money paid*: 2 Greenleaf Ev., sec. 113; 59 S. C. 81; 70 S. C. 380; 46 S. C. 37; 27 Cyc. 837; note to 4 Am. & Eng. Dec. Eq. 346; 94 S. C. 406; 2 Greenleaf Ev., sec. 114; Kesner Quasi Contracts 388; 27 Cyc. 837.

April 28, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This is an action to recover the sum of \$25,000 and interest, alleged to be due the plaintiffs by the defendant.

The complaint contains two causes of action, which will be reported, omitting paragraphs numbered 1, 2, and 8 of the first cause of action, and 1 and 2 of the second cause of action. The jury rendered a verdict in favor of the plaintiffs for the full amount claimed, and the defendant appealed upon exceptions, which will likewise be reported. The agreement introduced in evidence by the defendant, dated the 23d of December, 1908, will also be reported

First, second, and third exceptions: These exceptions assign error on the part of his Honor, the presiding Judge, in allowing the plaintiffs to introduce certain testimony,

to which the defendant made objection, on the  
1 ground that it tended to vary and contradict the written instrument hereinbefore mentioned. The respondent's attorneys contend that these exceptions do not point out with definiteness the testimony to which the defendant objected, and are, therefore, too general for discussion; also that they should not be considered, for the reason that the grounds of objection were not stated. When it appears, as it does in this case, that the Court and the attorneys understood the objection to continue throughout the trial, it was not necessary to repeat it every time similar testimony was offered.

Parol testimony is admissible to show a different consideration from that expressed in a written instrument when it was intended as a mere recital, as this would not otherwise

change the terms of the written agreement; but it is  
2 not admissible when the consideration is contractual, as in that event such testimony would alter the force and effect of the writing in other respects. The authorities upon which the appellant's attorneys rely fully sustain this proposition.

By reference to the contract between said parties, dated the 23d of December, 1908, it will be seen that the sum of \$375,000 was agreed upon as the price for the timberlands, and that the defendant, *Ruggles*, agreed to furnish that

amount and perfect the said purchase upon certain conditions; that said timberlands were to be conveyed to Ruggles, *who agreed to pay the consideration of \$375,000*, and take the title to said property; that the parties to the contract were thereupon to proceed to the organization of a corporation, and in such organization provide for two classes of stock, preferred and common; the *preferred* stock in the organization was to bear 6 per cent. per annum cumulative dividends to cover the *cash investment* of said property, etc., for which the said *Ruggles was to furnish the money*, as hereinbefore stated. There was a provision that the common stock should be divided as follows: To the said Ruggles and his nominees, 60 per cent. thereof, and to the said Gill and Leib and their nominees, 40 per cent. thereof. Upon the organization of the corporation Ruggles was to convey the property over to it, and the stock was to be issued and divided in the manner just stated.

It will thus be seen that the price of the timberlands, and by whom it was paid, determined the amount of preferred stock, and to whom it should be issued, and that the manner in which the corporation should be organized and controlled was dependent upon these two facts. The parol testimony tended to alter, vary, and contradict the written agreement in these material respects. The exceptions are therefore sustained.

Fourth exception: In the second cause of action it is alleged that the plaintiffs paid the sum of \$25,000 on the purchase price of said timberlands. Testimony in response

to this allegation was admissible, and it was not

3 rendered incompetent by reason of the failure to

allege other allegations. Objection to the introduc-

tion of testimony for the purpose of proving allegations that are in the complaint is not the appropriate remedy for determining whether the second cause of action is demurrable, on the ground that it fails to state facts sufficient to constitute a cause of action.

REP.]

November Term, 1918.

Fifth exception: It has not been made to appear that the ruling was prejudicial. Therefore the question  
4 whether it was erroneous is merely speculative. This exception is overruled.

Sixth and seventh exceptions: These exceptions cannot be sustained, for the reason that, even if testimony tending to prove the allegations of a complaint is erroneously ruled to be competent, the proper remedy is to appeal from  
5, 6 the erroneous ruling as to the admissibility of the testimony, and, if the appeal is sustained, a new trial will be granted; but this Court will not order a non-suit.

The remaining questions cannot be considered, for the reason that they refer to facts to be found elsewhere than in the exceptions themselves, and, therefore, are insufficient in form. *Jumper v. Bank*, 39 S. C. 296, 17  
7 S. E. 980; *Holzclaw v. Green*, 45 S. C. 494, 23 S. E. 515; *Tucker v. Railway Co.*, 51 S. C. 306, 28 S. E. 943. It is the judgment of this Court, that the judgment of the Circuit Court be reversed.

8835

## CAROLINA NATIONAL BANK OF COLUMBIA v. CITY OF GREENVILLE.

(81 S. E. 634.)

## MUNICIPAL CORPORATIONS. CONTRACTS. ASSIGNMENT OF CHOSE IN ACTION. RECORDING.

1. Assignment of a chose in action is not within the recording acts, and is valid though not recorded.
2. A contract for street paving, which stipulates that the contractor guarantees that for five years from the time of final payment he will keep the work in good repair and replace any defective material, does not permit the city, protected by a bond conditioned on the contractor performing the contract, to retain any part of the price to perfect the pavement and keep it in repair for five years from its completion.

3. Where an assignment authorized the assignee to apply funds in a specified manner, the trustee in bankruptcy of the assignor could not complain because the assignee so applied the funds.
4. Where there was no contest as to the existence of a fact, error, if any, in admitting secondary evidence to prove the fact, was not prejudicial.

Before SHIPP, J., Greenville, April, 1913. Affirmed.

Action by the Carolina National Bank of Columbia, S. C., against the city of Greenville and others. From a judgment for plaintiff, certain of the defendants appeal. Affirmed.

The following is the complaint of the plaintiff:

“(1) That the plaintiff is a corporation created under the National Banking Act, its principal place of business being in Columbia, S. C.

“(2) That the city of Greenville, S. C., is a municipal corporation, created under the laws of said State, and that W. E. Beattie, W. C. Gibson, and W. C. Cleveland constitute the paving commission of said city of Greenville under an act of the legislature and ordinances of the city council, and as such were vested with the power of making contracts for the paving of said streets, and had control over the execution of said contracts and for the payments to be made for paving and for public work.

“(3) That on or about the 9th of August, 1910, Wm. F. Bowe and T. C. Page, partners trading under the firm name of Bowe & Page, entered into a contract with the said city of Greenville, whereby the said Bowe & Page were to provide materials and lay and construct paving and storm sewers and curbing on certain streets in said city for an amount specified in said agreement.

“(4) That while engaged in the performance of said contract, the said Bowe & Page applied to plaintiff for several large loans to be used in the furtherance of said contract, and the plaintiff agreed to make certain advances of money

on condition that the said Bowe & Page would secure the plaintiff for all such advances by the assignment of all sums to become due to the said Bowe & Page, and the said Bowe & Page did, in pursuance of said agreement, execute unto the plaintiff the assignment of all amounts to become due to them under said contract, said assignment being dated September 2, 1910, a copy of which is hereby attached marked 'Exhibit A,' to which reference is craved as part of this complaint.

"(5) That the city of Greenville and paving commission were duly notified of said assignment and a copy of same was filed with the city of Greenville. That under said assignment the plaintiff advanced to the said Bowe & Page considerable sums of money, taking therefor the notes of the said Bowe & Page, and which were renewed from time to time, and which are now represented by two notes, as follows: One dated July 20, 1911, payable 30 days after date, and promising to pay the sum of \$10,000, with interest after maturity at the rate of 8 per cent. to be paid annually, and agreeing to pay all costs of collection, and 10 per cent. as attorney's fees if not paid at maturity, said note stipulating on its face that it was secured by the assignment of the said contract of the city of Greenville, and the other note being dated August 2, 1911, payable 60 days after date, and promising to pay the plaintiff the sum of \$500, with interest after maturity at the rate of 8 per cent. per annum, and the costs of collection, including 10 per cent. as attorney's fees if not paid. Said note stipulated on its face that it was secured by the assignment of said contract of the city of Greenville. That as further security for the moneys advanced, the said Rowe & Page, on May 30, 1911, made a further assignment in writing unto the plaintiff of said contract of which due notice was given to the city of Greenville, and the paving commission.

"(6) That there is now due to the plaintiff by the said Bowe & Page for moneys advanced by the plaintiff to the

said Bowe & Page, under the terms of said assignments, the following sums, to wit: \$10,000 with the interest thereon from August 20, 1911, at the rate of 8 per cent. per annum, together with 10 per cent. as attorney's fees, and the further sum of \$500, with interest thereon from October 2, 1911, at the rate of 8 per cent. per annum, together with 10 per cent. as attorney's fees, said sums being represented by the notes as aforesaid, and the sum of \$126.45 overdraft, with interest from July 22, 1911, and the sum of \$56.72 overdraft, with interest from August 17, 1911.

"(7) That said notes were placed in the hands of plaintiff's attorneys for collection, long prior to the bankruptcy proceedings against Bowe & Page, hereinafter referred to.

"(8) That some time during August, 1911, the city council of Greenville, S. C., and the paving commission, by some arrangement had between them and the said Bowe & Page, took over the said contract and undertook to complete the same, and the plaintiff is informed and believes that the said city council and the paving commission have completed the said contract, and there is a large sum of money due by the city of Greenville on account of said contract. That the plaintiff has demanded payment of its indebtedness against the said Bowe & Page under the terms of the assignments held by the plaintiff, as aforesaid, but the city of Greenville and the paving commission have declined to make payment thereof.

"(9) That some time in the fall of 1911, the said Bowe & Page were adjudged bankrupts in the District Court of the United States for the District of South Carolina, and W. C. Cothran, W. H. Grimbail, and Chas. Pearlstine were duly appointed trustees of the bankrupt estate, and plaintiff is informed and believes that said trustees claim some interest in the amounts due by the said city of Greenville under said contract of Bowe & Page, and they are made parties to this proceeding in order that they may set up their claim.

REP.]

November Term, 1918.

“(10) That the plaintiff has endeavored to secure a full accounting at the hands of the city of Greenville for all moneys due under said contract, but that the officers of said city of Greenville claim that they have not yet made up an account, and cannot give a definite statement of all matters involved in the adjustment of the amounts due to the plaintiff.

“Wherefore, the plaintiff prays: First, that the said city of Greenville and the said paving commission do fully account for all their acts and doings with reference to the contract with the said Bowe & Page, and that the amount due by the said city of Greenville under said contract be ascertained; second, that out of the moneys which are in the hands of the city of Greenville, or ought to be in the hands of the said city of Greenville, there be paid the amount due on the said two notes to the plaintiff, together with interest at 8 per cent. and 10 per cent. as attorney’s fees, and the amount of said overdrafts with interest; third, for the costs of this action and for such other relief as may be just.”

*Exhibit A.*

“State of South Carolina. County of Richland. Whereas, W. F. Bowe and T. C. Page, partners, trading and doing business under the firm name of Bowe & Page, have entered into a contract with the city of Greenville, in the State of South Carolina, to do and perform certain paving in the said city, as set forth in a contract executed by and between the said city of Greenville, and the said Bowe & Page, of date the 9th day of August, 1910, and specifications thereto attached; and whereas, the said Bowe & Page have borrowed from the Carolina National Bank, the sum of five thousand dollars (\$5,000.00) to be used in the execution of the said contract, as evidenced by the note of the said Bowe & Page, of \$5,000, dated September 2, 1910, payable November the tenth after date, to the order of the said



Bowe & Page, and by the said Bowe & Page indorsed to the Carolina National Bank: Now, in order to secure the payment of the said note as the same shall become due and payable, and any and all renewals thereof, or any further amounts which may be borrowed by the said Bowe & Page from the said the Carolina National Bank in the execution of the said contract, which said sum so borrowed shall be expressed in their note or notes to be hereafter executed, we, the said Bowe & Page, do hereby assign, transfer and set over to the said Carolina National Bank of Columbia, all sum or sums of money which shall become due and payable to the said Bowe & Page under the said contract; and we, the said Bowe & Page, do hereby authorize and direct the said city of Greenville to make all vouchers for the payment of work done under the said contract, payable to the order of the said Carolina National Bank as the work progresses, and whenever, from time to time, payment shall become due and payable under the said contract. And the said Bowe & Page agree further that a copy of this assignment shall be filed with W. E. Beattie, chairman of the paving committee, of the city of Greenville, which contract when so filed shall be full authority for the city of Greenville to make payments as hereinabove stated. In witness whereof, we, the said Bowe & Page, have hereto set our hands and seals this second day of September, nineteen hundred and ten. Bowe & Page. (L. S.)”

The contract provided as follows:

“The bidder in making his proposal on this work guarantees that for a period of five (5) years from the time of the final payment he will keep all work done under this contract in good order and repair, and replace any defective material, and repair any depression (except only such parts of the work as may be disturbed after the final estimate for laying or repairing sewers, water mains, house connections, service pipes or other work ordered by the city), and he will proceed at once to make the repairs when so directed by the

REP.]

November Term, 1918.

city, and that at the end of said guaranty period he will leave the street in good condition and free from any defects that will any way impair its usefulness or durability as a roadway.

"In case of failure on his part to make such repairs within thirty days of such notice (it being understood that such notice shall be given by mail to the address given by the contractor), then the city shall have the right to purchase such material and employ such persons as they may deem necessary, and complete said repairs as the agent of the contractor and charge the expense to him.

"The city will require a surety company bond for the faithful performance of this condition, and contractor shall furnish same before final payment is made."

*Messrs. Mordecai & Gadsden, Rutledge & Hagood, N. B. Barnwell and Wm. G. Sirrine*, for appellants, cite: *Recording act*: 1 Code of Laws, secs. 3542, 2655; 121 Fed. 582; 164 Fed. 300; 174 Fed. 654 (C. C. A.); 22 S. C. 139; 87 S. C. 116. *Checks written instruments*: Wigmore Ev. 1245 (c); 12 Rich. L. 518; 41 S. C. 177; 45 S. C. 569; 74 S. C. 218; 87 S. C. 81.

*Messrs. Haynsworth & Haynsworth*, for respondent, cite: *Check evidence of assignment of chose*: 21 Wall. 447; 119 Am. St. Rep. 629; 93 C. C. A. 122; 82 N. W. 922; 41 Pac. 849; 60 N. W. 886; 74 S. C. 210; 54 S. C. 364; 10 Rich. L. 271; 145 Fed. 966; 180 Fed. 235. *Intangible chose in action not within recording acts*: 10 Rich. L. 271; 47 N. W. 502. *Exception not based on record below*: 80 S. C. 460; 75 S. C. 25; 70 S. C. 466. *Construction of contract*: Elliott Contracts, sec. 1413; 97 C. C. A. 520; 37 Pac. 712; Dillon Munc. Corp. (5th ed.), sec. 831; Jones Liens, sec. 53; 37 N. J. Eq. 122; 38 N. J. Eq. 318.

April 29, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This record contains the following statement: "This action was instituted in the Court of Common Pleas for Greenville county, on the 10th day of February, 1912, for the purpose of ascertaining the amount due by the city of Greenville, under its contract with Bowe & Page, and requiring the city to pay over to the plaintiff from said balance, the amount due on two notes given to plaintiff by Bowe & Page, and an overdraft. On March 9, 1912, the attorneys for the plaintiff consenting, an order was signed by Judge R. W. Memminger, making W. C. Cothran, W. H. Grimbball and Charles L. Pearlstine, as trustees of Bowe & Page Dray and Construction Company, bankrupt, parties defendant. The case was referred to the master. On November 20, 1912, the master filed his report, in which he recommended that the plaintiff have judgment against the defendant, the city of Greenville, for the sum of \$12,899.76, that the defendant, W. C. Cothran, W. H. Grimbball and Charles L. Pearlstine, as trustees, have judgment against the defendant, the city of Greenville, for the sum of \$982.12, and that the defendant, the city of Greenville, be allowed to retain the remaining \$500 for perfecting the paving constructed by Bowe & Page, or in keeping it in repair for five years from the date of its completion. Exceptions were taken to the report, and were heard by his Honor, Judge S. W. G. Shipp, at the April, 1913, term. The report was confirmed and judgment entered up in accordance therewith. Within 10 days, notice of appeal was duly given to the attorneys for plaintiff, by the defendants, W. C. Cothran, W. H. Grimbball, and Charles Pearlstine, as trustees."

The facts upon which the plaintiff relies will more fully appear by reference to its complaint, which will be reported.

The defendants, city of Greenville and paving commission, by way of defense contended that Bowe & Page failed

REP.]

November Term, 1918.

to complete the paving of the streets in accordance with the terms of their contract, and that the said defendants should be allowed to retain a sufficient part of the sum in their hands to defray any costs and expenses they may be compelled to incur in compliance with the terms of said contract.

The appellants thus state the substance of their answer: "We, the trustees in bankruptcy of Bowe & Page Dray and Construction Company, and of Bowe & Page admit the formal parts of the complaint and the execution of the paving contract, and set up that under the bankruptcy act of the United States we are entitled to all money due by the city of Greenville under the paving contract. We set up the bankruptcy act, and claim that the bankrupt corporation and firm were insolvent, at the time of the notes and overdrafts, and at the time of the execution of the agreement of May 30, 1911, and within four months of the filing of petition in bankruptcy, and that any and all transfers of property by them to Carolina National Bank, within said four months, would be and are preferential transfers, and must be set aside under the bankruptcy act."

The first proposition argued by the appellant's attorneys is that the assignment executed by Bowe & Page on the 2d of September, 1910, in favor of the plaintiff, was null and void, on the ground that it was not recorded. Waiv-

1 ing the objection that this question is not properly before the Court for consideration, for the reason that it was not set up as a defense, the Court takes this opportunity to reaffirm the doctrine, already settled in this State, that the assignment of a chose in action, is not embraced within the provisions of the recording acts, as will appear by reference to the cases of *Williams & Co. v. Paysinger*, 15 S. C. 171; *Patterson v. Rabb*, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831. The case of *Williams & Co. v. Paysinger*, *supra*, was cited with approval in *Singleton v. Singleton*, 60 S. C., at page 235, 38 S. E. 462.

The next proposition for which the appellants contend is that they are entitled to the \$500 which the master allowed the city of Greenville to retain, for the purpose of perfecting the pavement and keeping it in repair, for five years

2 from the date of its completion. His Honor, the

Circuit Judge, assigned the following reasons for confirming the master's report in this respect: "I am satisfied that the city of Greenville is fully protected for any present or future defects in the paving done by Bowe & Page, under the bond given to the city of Greenville to protect it against such defects. The city of Greenville, as it appears to me, never expected to get any other protection than the bond. The contract did not contemplate its withholding any portion of the money to be paid Bowe & Page, for five years after completion of the contract as an indemnity against defects in the paving. The master has allowed the city of Greenville to withhold the sum of \$500 for any imperfections, and it seems to me that that is a very liberal allowance, in view of what I have just said." We do not draw the same conclusion as the Circuit Judge from the facts just stated. It would violate the terms of the contract to allow the city of Greenville to retain said amount for the purposes mentioned. We are more inclined to adopt this conclusion by reason of the fact that the city of Greenville is protected by the bond of the guaranty company, while the fund retained by the city of Greenville is the only source to which the appellant can resort for payment.

The next question argued by the appellant's attorney is that the plaintiff should have applied the deposits in its hand, to the overdue notes of Bowe & Page. The

3 exception raising this question cannot be sustained.

for the reason that the terms of the assignments authorized the plaintiff to apply the deposits in the manner which the appellants contend was erroneous.

The last question argued is whether there was error on the part of the Circuit Judge in ruling that the plaintiff could

prove the amount due without the production of the checks, on the ground that they were the best evidence as to  
4 the disposition of the deposits. It appears that there was no real contest as to the correctness of the amount claimed by the plaintiff. As it has not been made to appear that the ruling was prejudicial, it is not necessary to determine whether it was erroneous.

It is the judgment of this Court that the judgment of the Circuit Court be modified so as to conform to the conclusions herein announced.

MR. JUSTICE WATTS did not sit in this case.

Subsequent to the filing of the foregoing opinion, the agreement of counsel below set out was called to the attention of the Court, whereupon the Court, on May 7, 1914, made the following order :

PER CURIAM. On the 29th day of April, A. D. 1914, an opinion was filed by this Court in the above stated cause, holding that the defendant, city of Greenville, S. C., was not entitled to retain the sum of \$500 for the purpose of perfecting the pavements laid in said city by Bowe & Page, and of keeping the same in repair for five years from the date of their completion. Since the filing of this opinion, it has been brought to the attention of this Court that under order of the Circuit Court, dated March 28, 1913, and consented to by all of the parties to said cause, the defendant, city of Greenville, on April 5, 1913, paid to the plaintiff, Carolina National Bank of Columbia, S. C., the sum of \$13,238.38, being the full amount allowed to said bank by the master's report in said cause, dated November 20, 1912, with interest from the date of said report, which report was subsequently confirmed by the Circuit Court at the April, 1913, term.

All of the defendants gave notice of appeal from said decree. Subsequent to the giving of such notice, the fol-

lowing agreement was entered into (omitting caption): "It is hereby mutually agreed by and among the parties to the above stated action: (1) That the defendant, city of Greenville, shall pay the Circuit Court costs of the Court officers and stenographer in said action, and the costs (if any) of the witnesses, G. Frank League, W. E. Beattie, and C. P. Ballenger; but shall not pay any fees, mileage, or expenses of the witnesses, W. A. Clark or W. F. Bowe, or any portion of the costs of the appeal to the Supreme Court; (2) that the defendant, city of Greenville, shall pay to the defendant, W. C. Cothran, as trustee of Bowe & Page, bankrupts, the sum of \$573.50, and shall thereupon be discharged from further liability of any kind to any of said parties; (3) that the defendant, city of Greenville, shall not be required to account for the remainder of the funds in its hands to the credit of Bowe & Page, but may expend the same in any manner it may desire. Witness our hands this June 11th, 1913. Haynesworth & Haynesworth, Attys. for Carolina Natl. Bank. Wm. G. Sirrine, of counsel for W. C. Cothran *et al.*, as trustee. L. O. Patterson, Atty. for city of Greenville and others." On June 14, 1913, the city of Greenville accordingly paid to the defendant, W. C. Cothran, as trustee of Bowe & Page, bankrupts, the said sum of \$573.50. Under the terms of the agreement set forth, which was intended by all parties as a final disposition of the cause, so far as it concerned the city of Greenville, said city, by such payment, was discharged from further liability of any kind to any of the parties to said cause, except the payment of such costs as were specified in said agreement. Accordingly said city took no steps to perfect its appeal from said decree. Through oversight, the foregoing agreement was not brought to the attention of this Court prior to the filing of said opinion.

It is evident, therefore, that an injustice would be done to the city if it should now be compelled to refund said sum of \$500, or any other sum. The opinion heretofore ren-

dered by this Court is hereby modified by declaring that the city of Greenville shall not be required to make further payments of any kind on account of said cause, except for such costs as are specified in the agreement above recited.

8801

TUCKER v. BLEASE *ET AL.*

(81 S. E. 668.)

## CIVIL RIGHTS. PUBLIC SCHOOLS. SEGREGATION OF PUPILS.

1. In view of Const., art. III, sec. 33, declaring void the marriage of a white person with a negro or mulatto having one-eighth or more negro blood, the child of a union of a white person and one having less than one-eighth negro blood is entitled to exercise all the legal rights of a white man, except those arising from a proper classification, when equal accommodations are afforded.
2. While the child of a white person and one having less than one-eighth negro blood is entitled to exercise the rights of a white man, in view of Const., art. III, sec. 33, authorizing the marriage of such persons, school trustees, under Civil Code 1912, sec. 1761, subd. 8, providing that the trustees shall have authority and it shall be their duty to suspend or dismiss pupils when the best interest of the schools make it necessary, may, upon providing a school for children of this class, distinct from both the white and negro schools, suspend such child from the white schools when for the best interest of the other white pupils, who would be withdrawn if it was allowed to remain, notwithstanding section 1780, declaring that it shall be unlawful for pupils of one race to attend the schools provided for another, and Const., art. II, sec. 7, providing for separate schools for whites and negroes.

Petition for *certiorari* in the original jurisdiction. Petition dismissed.

Application by G. W. Tucker for a writ of *certiorari* against Cole. L. Blease and others, constituting the board of education in and for the State of South Carolina, to review

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FOOTNOTE—On the question of the right of an educational, charitable, or religious institution to exclude person on account of race or color, see note in 24 L. R. A. (N. S.) 447.



the dismissal of Herbert Kirby and others from the Dalcho public school. Order affirmed.

The petition was as follows :

“The petition of the undersigned, G. W. Tucker, respectfully shows to the Court :

I. That the Honorable Cole. L. Blease, by virtue of his office, J. E. Swearingen, D. M. O’Driscoll, C. J. Ramage, D. W. Daniel, A. G. Rembert, Lueco Gunter, D. T. Kinard and A. J. Thackston, are, and constitute the State board of education in and for the State of South Carolina, and at the times hereinafter mentioned, were performing their duties and acting in their capacity as members of said board.

II. That heretofore, to wit, on or about the 24th day of January, 1913, the wards of your petitioner were, and for a number of years prior thereto had been, in attendance upon the white schools in and for the county of Dillon, and were in such capacity pupils on the date mentioned, in the Dalcho public school, in said county, when they were, without cause, summarily dismissed from the said school and prohibited from further attending the same.

III. That thereafter, to wit, on the 29th day of January, 1913, your petitioner filed his petition with the county board of education in and for the county of Dillon, asking that his said wards be reinstated in said school, and be allowed to attend thereon, a copy of which petition is as follows :

“The petition of the undersigned, George W. Tucker, respectfully shows to the board :

I. That Dalcho public school is a school duly formed and organized under and by virtue of the public school law of the State of South Carolina, and John W. Coleman, Lawrence E. Dew and J. F. Williams, are the duly appointed and acting trustees thereof. That your petitioner has been duly appointed guardian, by the probate Court for Dillon county, of the person and estate of the above named children, Herbert Kirby, Eugene Kirby and Dudley Kirby, being four-

teen, twelve and ten years of age, respectively. And at the present time and since such appointment he has had the children in his custody and charge.

II. That upon the said children becoming old enough to enter the public schools of the State they immediately began attendance at the white public schools. The older one, Herbert Kirby, attending the white public school at Dothan, in the county of Dillon, for a period of about two sessions; that about four years ago the parents of the said children moved to the town of Dillon and the said children attended the public school for white children in the town of Dillon for two sessions; that upon the death of the parents of the said children your petitioner, as guardian, took them to live with him and placed them in the public school for white children at Dalcho, which said school they have been attending for two sessions and a part of the third.

III. That the wards of your petitioner have been attending the said public school at Dalcho during the present session; that they have always properly conducted themselves, and were in the proper pursuit of their duties as pupils of the said school up to and inclusive of Friday, January the 24th, when the said children were by the trustees above named summarily and without cause and without the children or guardian being given a hearing, dismissed from the school and notified that they would not be received back into the school.

IV. That the said children are entitled to attend the said school; that they have all the time been properly dressed, have properly conducted themselves, and there was no excuse for their being dismissed; that they are of the age that it is of the utmost importance that they should attend school to prepare them for their duties in life; that there is no other convenient school to which your petitioner can send the said children and by their being disbarred from the said school great and irreparable damage and injury will be done to them.

Wherefore, your petitioner prays, that this board do issue its order requiring the said John D. Coleman, Lawrence E. Dew and J. F. Williams, constituting a board of trustees for Dalcho public school, to show cause before your honorable board why the said children should not be forthwith reinstated in the said school. G. W. Tucker. Gibson & Muller, Petitioner's Attorneys."

Which petition was duly verified, and thereupon the county board issued its order authorizing and directing the board of trustees to show cause why the relief prayed for should not be granted.

IV. That the said cause came on for a hearing and the testimony was taken, upon the conclusion of which the said board filed their decision thereon, sustaining the acts of the board of trustees in dismissing the wards of your petitioner, but requiring the said trustees to furnish school facilities for children of the class to which it was claimed the wards of your petitioner belonged.

V. That within the time provided by the rules of the State board of education your petitioner duly appealed from the finding of said board, and asked that the same be reversed upon the following grounds, to wit:

(I) "Because the county board was in error in holding that according to the testimony produced at the hearing, the board of trustees of Dalcho public school district had the power and authority under the law to dismiss from the said Dalcho public school the wards of petitioner, Herbert Kirby, Eugene Kirby and Dudley Kirby.

(II) Because the county board of education was in error in holding that section 1761 of vol. I, of the Code of Laws of South Carolina of 1912, gave the said trustees power and authority in their discretion to dismiss or suspend from the public school without legal cause any child or children. The error being that the law distinctly provides for a school for the races, white and black, shall be separate, and there being no testimony in the case at bar sufficient to establish the fact

that the children in question were the children of the colored race, and there being no testimony showing, or tending to show, that the children in question acted improperly or disobeyed the rules and regulations of the school, they had the right to attend the white public school, and the action of the board in dismissing them was arbitrary and not in accordance with law.

(III) Because the county board of education was in error in holding and finding that the return of the trustees in this proceeding shows that the action taken by them was for the best interest of the school district and that the allegations of the return were sustained by the testimony. The error being that the testimony shows conclusively that there was no reason why the said children themselves should have been dismissed, but, on the contrary, shows that they were children of good behavior and intelligence, and there was no valid reason why they should have been so dismissed.

(IV) Because the law of the State of South Carolina with regard to the free public school provides that separate schools shall be maintained for the white and colored races, and the testimony shows conclusively that the children did not belong to the colored race, but were white and associated with white people. Their dismissal from the school, therefore, amounts and amounted to a denial to them of the benefit of the public school guaranteed to all by law, and the board was in error in not so holding.

(V) Because the testimony shows that the children in question own considerable property in the county and pay taxes thereon, including the school taxes levied in the district, and hence have the right to enjoy the benefit to be derived therefrom, and the county board of education was in error in sustaining the action of the trustees of the school district in depriving them of this right.

(VI) Because the board were in error in holding and providing that the trustees should provide separate educational facilities for the wards of petitioner and other children of

like situation in the district, the error being that the testimony shows that there are only a very few, or no other children, of the same class, as the wards of petitioner, in the district and such facilities could not be put into practical operation, and hence amounts to nothing more than depriving the children of their rights under the law.

(VII) Because the Constitution provides that any person with not over one-eighth of negro blood in him shall be in contemplation of law a white person and entitled to the privileges of such person, and the statutes provides that white children shall attend the white school, and the testimony showing that the children in question here were white and were of proper character to attend the white school, it was error on the part of the board to sustain the trustees of the school district in depriving them of this right.

(VIII) Because the uncontradicted testimony shows that the parents of the wards of petitioner have always associated with white people, that the father owned in his lifetime considerable property in the county and exercised all the privileges of white citizenship; that both parents were members of the first white Baptist church of Dillon; that some of the children were members of that church and others of Catfish Baptist church, also a church of white people; that the children have been attending the school in question for several sessions; that some of them attended the white public school in the town of Dillon, and other white schools in the county; all of which establishes conclusively that the children were recognized as and associated with white people, and the board was in error in not so finding and in refusing to allow them to re-enter the school.

(IX) Because the testimony shows that on several occasions the trustees of the school district have attempted to provide what they designate as separate facilities for education of children of a class alleged to be of the same class as the wards of petitioner, but in such attempts have resulted in failure, and if petitioner's wards have no other oppor-

tunity of obtaining the rights of a school to which they are entitled they will be entirely deprived of their rights and required to grow up in ignorance.

(X) Because there is no sufficient testimony to sustain the action of the board of trustees, such testimony as was offered being largely from the trustees themselves and tenants on their farms and from few, if any, of the landowners in said school district, all of which shows mere arbitrary action on the part of the trustees not supported by the public sentiment of the community, and the county board was in error in not so holding."

VI. That upon the hearing of said cause by the said State board of education, the said board, without making any formal written decision in the matter, notified your petitioner, through his attorneys, that the said finding of the county board was affirmed and the appeal was, therefore, dismissed.

VII. Your petitioner further respectfully submits that the State board of education erred as a matter of law in holding and deciding:

(1) That the county board of education was not in error in holding that according to the testimony produced at the hearing the board of trustees of Dalcho public school district had power and authority under the law to dismiss from the said Dalcho public school the said wards of your petitioner.

(2) In holding that the said county board of education was not in error in finding that section 1761 of vol. I of the Code of Laws of South Carolina of 1912, gave the said trustees power and authority, in their discretion, to dismiss or suspend from the public school without legal cause any child or children when the error was clear, in that the law distinctly provides for a school for the races of white and black, and that they shall be separate and distinct, and there being no testimony in the case sufficient to establish the fact that the children in question were children of the colored race,

and there being no testimony tending to show that the children in question acted improperly or disobeyed the rules and regulations of the school, they had the right to attend the white public school.

(3) That the State board erred in not finding the county board of education in error in holding and finding that the return of the trustees in the proceeding shows that the action taken by them was for the best interest of the school district, and that the allegations of the return were sustained by the testimony; the error being that the testimony shows conclusively that there was no reason why the said children themselves should have been dismissed; but, on the contrary, shows that they were of good behavior and intelligence, and there was no valid reason why they should have been dismissed.

(4) Because the State board of education erred as a matter of law in holding that the trustees of school districts in any district could provide as many white or colored schools as they saw fit and could require any pupil in said district to go to any specific school without regard to the rights, convenience or qualifications of said child.

(5) Because the Constitution provides that any person with not over one-eighth of negro blood in him shall be in the contemplation of law a white person and entitled to the privileges of such persons; and the statutes provide that white children shall be entitled to attend white schools, and the testimony showing that the children in question were white and of proper character to attend the white schools, and it was, therefore, an error, as a matter of law on the part of the State board of education, to sustain the trustees of said school district in depriving the said children of this right.

(6) Because the uncontradicted testimony shows that the parents of the wards of the petitioner have always associated with white people; that the father owned, in his lifetime, considerable property in the county and exercised all the

rights and privileges of white citizenship; that both parents were members of the first white Baptist church of Dillon; that some of the children were members of that church and others of Catfish Baptist church, also a church for white people; that the children have been attending the school in question for several sessions, and some of them attended the white public school in the town of Dillon and other white schools of the county; all of which established conclusively that the children were recognized as and associated with white people, and it was an error of law on the part of the State board of education to hold, when both under the Constitution and by association, that the said children were white, that they were not entitled to attend the white schools in said district.

(7) Because the State board erred in sustaining the finding of the county board that separate school facilities should be provided for the children in question, when the testimony shows conclusively that no such facilities could be provided, and that the school in question which the children had been attending was most convenient and most beneficial for them, and in so sustaining the said finding deprived them of the rights to which they are entitled under the law.

VII. The petitioner further shows, that because of the errors of law above set forth, his wards have been deprived of their legal rights, and he has no other remedy save and except that this Court grant to him a writ of *certiorari* to the said State board of education, directing the said board to send up the record in said cause to the Supreme Court of the State of South Carolina to review the same as provided by law.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of this Court to the said State board of education to the end that the Supreme Court of the State of South Carolina may be informed of all of the proceedings had in said matter, and may investigate the legal questions arising therein and determine the same in accord-



ance with law. Geo. W. Tucker, Petitioner. Gibson & Muller, Attorneys of Petitioner."

The synopsis of the testimony prepared by petitioner's attorney is as follows:

"John D. Coleman, being duly sworn, says: 'I am chairman of the board of trustees, and have held the position for about 14 years; that the facts set up in the petition are true; that the matter was brought to the attention by other children in the class attempting to come in and the petition that was filed with the trustees. The names to the petition are citizens of the community and patrons, and I know a majority of them personally. Upon the petition being filed, we called a meeting of the board of directors. Every phase was gone over, and we decided it was for the best interest of the school to dismiss them. The children nor their guardian were notified until the day they were dismissed. We had a talk afterwards with Mr. Tucker, and gave the reason for dismissal, "that the children were not white." Mr. Tucker stated that they had never been considered anything but white. It is generally known that they are not pure Caucasian blood. I knew their father for 22 or 23 years, but have only seen the children going to and from school. If these children were allowed to attend school others of the class would seek to come in, and our position was that we could not exclude others without these. Since I have been a member of the board of trustees, the trustees have been paying the tuition of children of this class anywhere they could get in school. We also established a separate school, had three teachers, one taught 2 or 3 years, and the other two a year each. The last one stayed only a week. It was not successful, and we decided to adopt the old plan. We are willing to establish a separate school. There are 10 or 12 in the class.'

"On cross-examination, he testified that they were neither white nor black, but were Croatan or mulatto. 'In dismiss-

ing them we did not investigate what mixture of blood was in them. We didn't have to do that. I have known that they are mixed for 20 years, from what I have heard people say. I knew the mother of John Kirby and his brothers and sisters; most of them were only half brothers and sisters. John Kirby was the oldest of these children. Eliza Foxworth was their mother. John Godbolt was the father of John Kirby, but I could not give the lineage further back. The alleged taint in the blood came in through the Godbolts, there being two separate and distinct families of this name. From John's appearance we judge that the mixture was not very far back. These children have the appearance of white children. We had general information on which we acted in reaching this conclusion. I am a member of Catfish Baptist church, of which some of the Kirby children are members. George Tucker is not a member of this church, but goes there some time. Mr. Tucker owns some property in the school district. The children own in the county a tract of land containing 300 acres, and perhaps own some property in the town of Dillon. This is the third session they have been in school, and I have never heard of them giving any trouble. They are always properly clad as far as I know, and are average pupils. Ed Kirby went to Dalcho school about 10 years ago. It has been at least 3 years since we have attempted to have a separate school. No provision was made for these children except that we offered them the same chance we made others.'

"On redirect examination, he testified that John Kirby had sisters and half brothers who associated with him who were not white. 'Mrs. Kirby had one half brother and sister who were colored. John Kirby associated with colored people. We told Mr. Tucker if he could get enough children of this class we would build another schoolhouse. As there seemed to be such a few, it would not justify us to do so. He said he would help us, but would not patronize it. Some years ago people of this class had a space set apart for

them in Catfish Baptist church, as did also the negroes. We told Mr. Tucker on more than one occasion that we had raised no objection to his children. I have had John Kirby work for me, and have associated with Mr. Tucker in a business way. I have known Mr. Tucker to have one of the half brothers to live with him and work for him. There are 80 some odd children in the Dalcho district and 10 or 12 of this class. When these children first entered, because of Mr. Tucker, we thought it a business thing to do to let them go to school, unless their going would in some way become detrimental. We finally decided it was not for the best interest, because other children of the class would come in. Four others attempted to enter, some of whom were a good deal darker. We thought it was not best that the Kirby children should attend school, as the patrons would not want their children raised up with them.'

"J. F. Williams, being sworn, testifies: 'I have lived in this community for 18 years, and have been a trustee since last spring. I know the Kirby children and knew their father. I have always heard that he was not clear-blooded. Mr. Coleman's statement of the situation in the matter is correct. I was not on the board when these children were originally admitted. I had a talk with Mr. Tucker, and told him why we had dismissed the children, on account of their ancestry, associations, and reputation in the community. I am willing to provide another school for children of this class. No such provision has been made. The petition did not mention the Kirby children. I have heard that John Kirby owned a good deal of property in the county. I know Ed Kirby, the oldest child, and all of the children are practically of the same appearance. We did not act from appearance; so far as I know, these children have always properly behaved. They have been going to school for several sessions, and are ordinary pupils. George Tucker is a white man. The Kirby children attend Catfish church. The action taken was decided by the reputation and petition.

REP.]

November Term, 1918.

Some of the brothers and sisters of John Kirby could not be considered white. They sometimes associated together. I think it would be detrimental to the school to reinstate them. Sam Edwards carried the petition around. He had a brother who killed John Kirby. I do not know of these children associating with negroes.'

"L. E. Dew, being sworn, says: 'I have been a trustee of the school for two or three years. We considered the matter carefully when we dismissed the children. We were led into the action by frequent objections raised to these children and by others attempting to come in. I know the signers of the petition, and, to the best of my knowledge, they are patrons of the school. Objections were made besides the petition. I had a talk with Mr. Tucker, and explained to him why the children were dismissed, which was because they had the reputation of not being pure-blooded. John Kirby had the same reputation. He had some brothers and sisters who had more colored blood in them than white blood. I do not know whether they associated together or not. I am willing to make provisions for these children. I think it would be detrimental to the school to allow them to be reinstated. A separate school was established, but the teacher came down and refused to teach. There were two or three of these attempted schools, but the attempts have never been successful, owing to the fact that the patrons will not stick together. We did not give their guardian a hearing. So far as I know they have always conducted themselves properly. I did hear a report that one of the children carried a pistol to school, but no investigation was made, and I have never heard of any other misconduct. We didn't have any special kick against these children. John Allen, who is not a patron of the school, made some complaint, as did Sam Edwards, who carried the petition around. I think it was mentioned by others, who claimed that we were not properly exercising our office in allowing these children to remain in school on account of their color, reputation, and

family. Mr. Tucker is a white man, and owns property in the district. I have never heard of the children exercising any bad influence in school. Mrs. Tucker is an aunt of the children. As a result of the reinstating of the children there would be a wholesale resigning of the trustees and a tearing up of the school. I think the only teacher we could get to teach a separate school would be one of their class.'

"Chancler Hatchell, being sworn, says: 'I have lived in the school district about 14 months, and the reputation of the Kirby children is that they are not white. I objected to these children attending school because they were not clear-blooded. I do not know the ancestry of John Kirby, but by his looks he was not pure white. His boy Ed is as white as any one in the room. I heard from my children of their rowing once. Never heard of them breaking any rules in the school and of them being punished for conduct. I don't know who was to blame for the row. If the children were reinstated, I would take my children out of school and put them to work. I do not own any land, but live on a rented place.'

"Will Baxley, being sworn, says: 'I am one of the patrons of Dalcho school and object to the Kirby children going back, because they are not white. I do not own any property in the district, but run a share crop for Mr. Coleman; am his brother-in-law. Pay \$6.50 taxes in Dillon and \$5 in Marion. If these children were put back, I would keep mine at home and let them plow. My objection to the children is that people say they are not white. One of them cut my boy's coat about two years ago. I don't know how or who was to blame. Mine might have been. I have never heard of them being punished at school, and, as far as I know, they are good pupils.'

"S. T. Godbolt, being sworn, says: 'I knew Mrs. Kirby. She lived below Marion and had three brothers, who admitted that they were colored. They associated with her before she was married. She was the daughter of Liza

Foxworth. She was a white woman. I am no kin to John Kirby. I did not know anything about Mrs. Kirby after she was married; she moved away. I never heard of her or her children associating with negroes.'

"Ben Foxworth, being sworn, says: 'I am a half brother to Mrs. Kirby. We resided in Marion county together. She was a white woman.'

"Henry Kirby, being sworn, says: 'I am a half brother of John Kirby. We had the same mother, and were raised together. Sue Kirby was our mother. She was a white woman. John Godbolt was John Kirby's father.'

"J. E. Henry, being sworn, says: 'I am mayor of Latta and have known John Kirby a good many years. I don't think he was considered a white man. I do not know who his father was. Sue Kirby was his mother. He associated with white people in a business way. He did not attend the white church I attended.'

"Sam Edwards, being sworn, says: 'I live in Dalcho school district; am a patron and property owner. Own some land out of the district. I took the petition around, but did not have anything to do with the killing of John Kirby, and took no part in the trial. I knew him for several years. His reputation was that he was not clear-blooded. I do not know Kirby's children, but signed the petition, for I do not think they should attend this school. It would not be for the best interest of the school to reinstate them. I dictated the petition and circulated it. I send my children to this school. I took the petition to all who would sign it. I do not know whether all who signed it had children in the school. I turned the petition over to Lawrence Dew, a member of the board of trustees. The petition was not directed at the Kirby children, who had been going to school about two years. This is the first year I have been interested in the school. I do not know how near John Kirby was a white man or whether he attended white churches.'

"John C. Hayes, being duly sworn, says: 'I have lived in this school district all of my life, and knew John Kirby

before he was grown. He was not considered clear-blooded. Have been patronizing the school eight or ten years, or maybe longer. Have been interested in its welfare. Am a taxpayer, and own property in the district. I signed the petition, and do not think it would be to the advantage of the school to reinstate the Kirby children. They have been attending the school for several years. I do not know of John Kirby attending a white school. I don't know John Kirby's wife, nor whether he was a member of the First Baptist church at Dillon.'

"Stephen Bethea, being sworn, says: 'I live in the district, but have no children in school. However, I am interested in its welfare. I signed the petition, and knew John Kirby for several years. He was not considered a clear-blooded white man. I do not think it would be for the best interest of the school to reinstate these children. I do not know the extent of the mixture. He associated with white people in a business way, and I have seen him at white churches. I didn't know his children were going to school until the petition was circulated. I don't remember whether Ed Kirby was attending school at Catfish when I was or not. I have seen Henry Kirby. I am a taxpayer, own real and personal property in the district.'

"G. F. Bethea, being sworn, says: 'I live in Dalcho district. Knew John Kirby, and he was considered a Croatan. I do not know what the mixture of blood was, nor whether he associated with white people, except in a business way, nor whether his children attended the white schools. Did not know his father or mother.'

"John C. Allen, being sworn, says: 'I live in this school district. Am a taxpayer, and own property in it. Have children going to school, and am interested in its welfare. I knew John Kirby, and he was not considered white. That it would be of the best interest of the school that the children be excluded. I do not remember whether John Kirby attended white schools and white churches or not, nor

REP.]

November Term, 1918.

whether his children did so. I know his children have attended the white school recently. Do not know whether they attended school at Dothan or Dillon, or whether they were members of the white churches at Catfish and Dillon. I don't know how much he lacked of being clear-blooded.'

"John C. Sellers, being sworn, says: 'I am 65 years old, son of W. W. Sellers, who wrote a history of Marion county. I helped him do the work. I knew John Kirby. His father was Big John Godbolt. He was one-eighth mixed blood. He was a soldier in the Confederate War and was badly wounded, and is now drawing a pension. His father was Long Billy Hayes, a white man. He died soon after the war. John Godbolt's mother was Martha Godbolt. Her mother was Polly Godbolt and sister of old John Godbolt, who was a white man. The family tree offered in evidence was made under my directions. I do not know who the mother of Sally Owens was. One-Arm Godbolt was the father of Martha Godbolt. He was a white man. Sally Owens was the mother of Polly Owens; she was a white woman. The mother of the Kirby children was a Foxworth; she was a white woman. The per cent. of the colored blood in the Kirby children is one-thirty-second. I knew John Kirby, and he didn't associate with negroes. I have heard that these children attended white schools and churches. My knowledge is not based entirely on tradition. I remember old John Godbolt, who died since I was married. He was my neighbor, and lived near me. I knew the Foxworth family. I did not know that John Godbolt had children who were colored. I knew Henry Kirby when he was a boy. I knew that the family was pretty badly mixed.'

"George W. Tucker, being sworn, says: 'I am guardian of the Kirby children. Live in Dalcho school district. Have had them more than 2 years. They have been attending white schools; this makes a part of the third session. Their father patronized the white schools 10 or 12 years ago, sending Ed and Lucy. I am their uncle; I married John Kirby's



sister. I own a little property in Dalcho school district, and the children own a plantation worth about \$15,000, and a house and lot in the town of Dillon. I have known John Kirby about 25 years. I first knew John Kirby when he was a boy. He went to school very little, but attended the white school at Kirby's Crossroads when he did go. I knew his wife, and she was said to be a white woman. What little association John Kirby had was with white people. He was a hard worker. Sent his children to Dalcho public school for 3 years about 12 years ago, and until he moved away, and then sent to Dothan white school for 5 years, and moved to the town of Dillon, where his children attended the white graded school. Six of them attended for 2 years. He and his wife were both members of the First Baptist church, and were buried by their pastor, Rev. H. A. Willis. Two of the children died while they were in Dillon, and Mr. Willis buried both of them. Ed Kirby belongs to Catfish church, which is a white church, and on the same grounds that the white school is. So far as I know, there was never any objections to the children until they were dismissed. Nothing was said to me about it until they were instructed not to return. I have seen Henry Kirby and Ben Foxworth, and they are both colored men. Henry worked for me awhile 7 or 8 years ago. He boarded in the kitchen, and ate at the table with me some of the time. I have not seen Ben Foxworth since he was a boy. I do not know Julius Foxworth, but know William, who, I think, is colored. I have been living in the Dalcho district 10 years. I have been married 22 years. My wife is a full sister of John Kirby. The property owned by the children is in the Dothan district. I talked with the trustees about dismissing the children, and told them they had nothing like an eighth ( $\frac{1}{8}$ ) colored blood in them. I did not agree to leave the matter to the patrons. I think at the meeting the vote taken stood 13 to 1 for dismissal. All of the names signed to the petition were not patrons; 11 are. I notified some of the patrons of a meeting

to consider the question of reinstating the children that had been dismissed.'

"Ed Kirby, being sworn, says: 'I am 20 years old, brother of the children in question. Am not now attending school, but with my brothers attended Dalcho and Dillon schools. I am a member of the Catfish Baptist church. My father and mother were members of the First Baptist church of Dillon. My sister, Lucy, who is dead, was a member of Catfish church. Mr. Willis performed the funeral rites over my father and mother.'

"H. W. Langford, being sworn, says: 'I am president of the cotton mills of Dillon, and am clerk of the First Baptist church. The membership record shows that John and Annie Kirby were members of the First Baptist church. The names of no other Kirbys appear thereon.'

"Rev. H. A. Willis, being sworn, says: 'I am pastor of the First Baptist church in Dillon, and John Kirby and wife were received by letter a short time after I came here, about four years ago. I performed the rites over them when they were buried. I am a native of Virginia, and came here from Weldon, N. C. I never hesitate to conduct funeral services. I know the Catfish church only through association acquaintance.' "

*Messrs. Gibson & Muller*, for the petitioner, submit:

The exceptions raised five questions:

1. Under the testimony in the case as a matter of law, do the children in question belong to the white or colored race?

2. Does section 1761 of volume I of the Code of Laws of the State of South Carolina give boards of trustees the power and authority to arbitrarily dismiss pupils from school without a hearing, when in their opinion it will be to the best interest of the school?

3. Is there any testimony in the present case to warrant such a finding?

4. Have the trustees power and authority under the law to establish separate schools for the same race and to require pupils to attend a certain and definite school without regard to their convenience or preference?

5. Does not the act of the trustees in dismissing the children in question deprive them of their rights under the law, especially in view of the fact that the testimony shows without contradiction that a separate school could not be successfully maintained?

On first proposition, they cite: 21 S. C. L. 614; Const., art. III, sec. 33; art. XI, sec. 7; 26 Fed. Cases 15548; 20 A. & E. Ann. Cases 1297; 20 A. & E. Enc. of L. 213; 7 So. 261; 50 N. C. 11; 80 Va. 538; 28 Gratt. 939; 4 Ohio 353; 34 Me. 77. *On power of trustees*: 1 Code of Laws, sec. 1761; Const., art. XI, sec. 5; 17 Am. Rep. 412; 35 Cyc. 1140; 89 S. W. 506; 15 A. & E. Ann Cases 404. *Separate schools*: 1 Code of Laws 1756; 35 Cyc. 1114, 1111.

*Messrs. L. D. Lide and Joe P. Lane*, for respondents, cite: *Certiorari*: 76 S. C. 412. *Powers of board*: 1 Code of Laws, sec. 1761; 52 S. C. 201. *Racial status of children*: Const., art. III, sec. 33; art. XI, sec. 7; 3 Rich. L. 136; 2 Bail. 558; 2 Hill L. 616; 1 Bail. 270.

April 21, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This is an application for a writ of *certiorari* for the purpose of determining by what authority the trustees summarily dismissed Herbert Kirby, Eugene Kirby, and Dudley Kirby from attending as pupils the Dalcho school, of Dillon county, for white children.

The facts out of which the controversy arose, and the action taken by the county board of education, will appear from the following decision rendered by them: "On or about the 24th day of January, 1913, John D. Coleman, Lawrence

REP.]

November Term, 1918.

E. Dew, and J. F. Williams, constituting the board of trustees of Dalcho public school, dismissed Herbert Kirby, Eugene Kirby, and Dudley Kirby from the white public school of that district. This proceeding was commenced by George W. Tucker, as guardian of the above named children, by petition to this board for a rule to show cause why the wards of petitioner should not be reinstated in the white public school of the district. The rule, as prayed for, was issued by the chairman of the county board, and the trustees of said school appeared on the 14th day of February, 1913, and filed their return to the rule, on which day the hearing of the matter was commenced, and same was completed on the 24th day of February, 1913. We deem it unnecessary to discuss in detail the questions raised by the testimony. Subdivision 3 of section 1761, vol. I, Code of Laws of 1912, gives school trustees the power 'to suspend and dismiss pupils, when the best interest of the school makes it necessary.' We understand, of course, that this section does not confer upon school trustees any power or authority to arbitrarily suspend or dismiss from school any child or children within their district. To the trustees of a school district is intrusted the welfare and best interests of their school, and this power to suspend or dismiss can be exercised by them in a proper case only when the welfare and best interest of such school renders such action absolutely necessary. Also the exercise of such power is always under the supervision of, and subject to review by, the county board of education, as, indeed, are all of the official acts of the trustees of a district. The return of the trustees to the rule shows, we think, that the action taken by them in this matter was for the best interest of the schools in the district. We find that all the material allegations set forth in the return are sustained by the testimony. After having given the matter careful consideration, we are of the opinion that the action of the trustees should be sustained. We think, however, proper school facilities should be provided for the wards of petitioner, and

all other children of the district in a like situation, as soon as practicable. The return to the rule to show cause herein having been adjudged sufficient, the rule should be discharged, and it is so ordered. It is further ordered herein that the trustees of the district be required to furnish and provide proper school facilities for the wards of petitioner, along with any and all other children similarly situated within the district."

The return of the trustees shows that these children had been attending the Dalcho school two sessions prior to the session during which they were dismissed; that objection had been made at various times to their presence in the school, but, as there were no others of that class attending, the trustees had been loath to take any action; that, shortly before they were dismissed, other children of the same class were attempting to enter the said school, and complaints were being made by its patrons; the trustees saw that, unless all children of that class were dismissed from the school, it would be materially injured. The return further shows that the trustees, in dismissing these children, were not actuated by any feeling of animosity towards them, but that their action was based upon what they deemed to be for the best interest of the school. They further alleged that they were ready and willing to provide a school for all children of this class in that district; that such a school had been provided in the past, but had been discontinued, because of friction among the patrons, and that, since the discontinuance of said school, the trustees had provided for the attendance of such children in other districts where they were allowed to enter the schools. The return also contains the following language: "That respondents are informed and believe that the wards of petitioners are not of pure Caucasian blood, and that this fact is generally known to the citizens of the community, and that it would not be right or proper, or for the best interest of the schools in said district, for the children to attend the white public schools, and for the further

reason that the environment and antecedents of the said children, and the knowledge of the public thereof, place them in a separate class from the white people of the community."

There was an appeal to the State board of education, which decided: "That the action of the Dillon county board of education be sustained, and the appeal be dismissed."

The synopsis of the testimony prepared by the petitioner's attorneys will be incorporated in the report of the case.

Section 385 of the Criminal Code, which embodies the provisions of an act passed in 1879, is as follows: "It shall be unlawful for any white man to intermarry with any

woman of either the Indian or negro races, or any  
1 mulatto, mestizo, or half-breed, or for any white woman to intermarry with any other person than a white man, or for any mulatto, half-breed, negro, Indian, or mestizo to intermarry with a white woman; and any such marriage or attempted marriage, shall be utterly null and void, and of none effect; and any person who shall violate this section \* \* \* shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished."

Section 33, art. III, of the Constitution, provides that: "The marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more negro blood, shall be unlawful and void."

Section 7, art. XI, of the Constitution, is as follows: "Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race."

Section 1780, Code of Laws 1912, provides that: "It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race."

The first question for consideration is whether section 33, art. III, of the Constitution, which provides that "the marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more of negro blood, shall be

unlawful and void," entitles the child or parents, where one of them was a white person, and the other had *less* than one-eighth of negro blood, to be classed as a white person, in the exercise of his legal right.

The most sacred relation into which a man and woman may enter by contract with each other is that of marriage; yet the framers of our Constitution made it a part of our organic law that it should be lawful for a white person to marry another with negro blood, provided it was *less* than one-eighth. Such being the case, we are unable to discover any good reason why the child of such parents should not be entitled to exercise all the legal rights of a white person, except those arising from a proper classification, when equal accommodations are afforded. As, however, the right to classify is denied, the next question which naturally suggests itself for consideration is that relating to the power of classification in such cases.

We therefore proceed to determine whether the law allows a proper classification to be made between those without negro blood and those with *less* than one-eighth, when there is a provision for equal accommodation.

The law recognizes that there is a social element, arising from racial instinct, to be taken into consideration between those with and those without negro blood. The statutes and provisions of the Constitution hereinbefore quoted

2 show that the law not only recognizes a classification, but makes it mandatory, and provides a penalty for failure to observe the laws in this respect, in the instances therein mentioned. The decisions prior to the abolition of slavery show that the classification between white and colored persons did not depend upon the extent of the mixed blood.

The rule was thus stated by Chancellor Harper, who delivered the opinion of the Court, in *State v. Cantey*, 2 Hill 614: "We cannot say what admixture of negro blood will make a colored person, and by a jury one may be found a colored

person while another of the same degree may be declared a white man. In general, it is very desirable that rules of law should be certain and precise; but it is not always practicable, nor is it practicable in this instance, nor do I know that it is desirable. The status of the individual is not to be determined solely by the distinct and visible mixture of negro blood, but by reputation, by his reception into society, and his having commonly exercised the privileges of a white man. But his admission to these privileges, regulated by the public opinion of the community in which he lives, will very much depend on his own character and conduct; and it may be well and proper that a man of worth, honesty, industry, and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confined to the inferior caste. It will be a stimulus to the good conduct of these persons, and security for their fidelity as citizens."

The following language was used by the Court in the case of *White v. Tax Collector*, 3 Rich. 136: "It may happen that persons in equal degree from the African stock may present such different complexions and features that they would readily be assigned to different castes. Habit and education have so strongly associated with the European race the enjoyment of all the rights and immunities of freedom that color alone is felt and recognized as a claim. On the contrary, a strong repugnance prevails against a participation in the rights of citizenship by any who bear in their persons the traces of their servile origin. This aversion is, however mitigated by the deference which honesty, sobriety, and industry, and the qualities that unite in a respectable character, enforce on the mind. \* \* \* Whatever rules may be adopted, the question of the reception of colored persons into the class of citizens must partake more of a political than a legal character, and, in a great degree, be decided by public opinion, expressed in the verdict of a jury."



In the case of *Flood v. News and Courier Co.*, 71 S. C. 112, 50 S. E. 637, 4 Ann. Cas. 685, this Court quoted with approval, the following charge of his Honor, the presiding Judge, in *Smith v. Chamberlain*, 38 S. C. 529, 17 S. E. 371, 19 L. R. A. 710: "Among the citizens of South Carolina we have two distinct races. Before the law they are equal. The colored race, in our Courts of justice, stand on the same plane as the white race. Our laws bear equally on all, without regard to race, color, or previous condition. Our social conditions, however, are very different. Friends, companions, neighbors must be of our own choice. These relations and associations the law does not undertake to make or regulate for us. If we do not wish to associate with one class of society, there is no law that I know of which compels us to do so."

We also quote as follows from *Flood v. News and Courier*, 71 S. C. 112, 50 S. E. 637, 4 Ann. Cas. 685: "Now, it must be apparent from consulting the texts of these amendments (thirteenth, fourteenth, and fifteenth to the Constitution of the United States), that there is not the slightest reference to the social conditions of the two races, and nothing can be imported into these amendments to give any such effect. All take pleasure in bowing to the authority of the United States in regard to these three amendments, but we would be very far from admitting that the social distinction subsisting between the two races has been in any way affected." The Court then quoted with approval the following language, used by the Court of Appeals of New York in the case of *People v. Gallagher*, 93 N. Y. 438, 45 Am. Rep. 232: "This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the func-

tions respecting social advantages with which it is endowed." The Court also immediately thereafter quoted the following language from *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256: "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane."

In the case of *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256, the Court further says: "The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages has been frequently drawn by this Court. \* \* \* A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races. \* \* \* The object of the fourteenth amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the State legislatures, in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for the white and colored children, which has been

held to be a valid exercise of the legislative power even by Courts of States where the political rights of the colored race have been longest and most earnestly enforced."

One of the earliest decisions in such cases is that of *Roberts v. City of Boston*, 5 Cush. (Mass.) 198, in which Chief Justice Shaw said: "The great principle, advanced by the learned and eloquent advocate for the plaintiff (Mr. Charles Sumner), is that, by the Constitution and laws of Massachusetts, all persons, without distinction of age or sex, birth or color, origin or condition, are equal before the law. \* \* \* But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security."

In the case of *Ex parte Plessy*, 45 La. Ann. 80, 11 South. 948, 18 L. R. A. 639, the Court says: "Even were it true that the statute is prompted by a prejudice on the part of one race to be thrown in such contact with the other, one would suppose that to be a sufficient reason why the pride and self-respect of the other race should equally prompt it to avoid such contact, if it could be done without the sacrifice of equal accommodations. It is very certain that such unreasonable resistance upon thrusting the company of one race upon the other, with no adequate motive, is calculated, as suggested by Chief Justice Shaw, to foster and intensify repulsion between them, rather than to extinguish it."

While the testimony shows that the children are entitled to be classed as white, nevertheless the action of the board of trustees was neither capricious nor arbitrary, as they are willing to provide equal accommodations for the Kirby children and those in the same class with them. The testimony

REP.]

November Term, 1918.

also shows that the decided majority of the patrons would refuse to send their children to the Dalcho school if the Kirby children were allowed to continue in attendance. Tested by the maxim, "The greatest good to the largest number," it would seem to be far better that the children in question should be segregated than that the large majority of the children attending that school should be denied educational advantages.

Subdivision 3 of section 1761, Code of Laws 1912, which provides "that the board of trustees shall also have authority, and it shall be their duty to suspend or dismiss pupils, when the best interest of the schools make it necessary," shows that the action of the trustees in dismissing the said children, was justified by the law of the land, and that the petition should be dismissed.

Petition dismissed.

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8807

MAPLES v. SPENCER.

(81 S. E. 488.)

RECOVERY OF POSSESSION OF LANDS. SLAVE MARRIAGES ISSUE FOR JURY.  
LANDLORD AND TENANT. ESTOPPEL.

1. The weight of testimony being for the jury, the case should not be taken from them where there is any testimony supporting plaintiff's claim.
2. In action to recover possession of undivided interest in lands which plaintiff claimed as the heir of his mother, evidence *held* sufficient to go to the jury on the questions whether plaintiff was the legal heir of his mother, and whether defendant was estopped from disputing plaintiff's title.
3. Where defendant leased land from plaintiff, paying rent therefor, the relation of landlord and tenant arose, and defendant is estopped to deny plaintiff's title.

Before GAGE, J., Sumter, June, 1913. Reversed.

Action for the recovery of an undivided interest in lands, and the partition of the same, by Hercules Maples against Kate Spencer. From an order dismissing complaint, plaintiff appeals.

*Mr. Marion W. Seabrook*, for appellant, cites: *Nonsuit improper in equitable action*: 88 S. C. 183; 54 S. C. 115; 23 S. C. 388; 25 S. C. 72; 28 S. C. 530; 31 S. C. 262; 41 S. C. 195; 52 S. C. 236; 53 S. C. 367; 71 S. C. 280; 76 S. C. 167; 36 S. C. 559. *The testimony as to marriage relation should have been submitted to the jury*: 75 S. E. 964; 73 S. E. 775; 54 S. C. 498; 26 S. C. 187; 20 S. E. 745; 33 S. C. 198; 38 Cyc. 1557-1558. *Tenant estopped to deny landlord's title*: 24 Cyc. 887, 888; 4 Strob. 196; 1 N. & McC. 369, 373, 374; 24 Cyc. 934; 69 S. E. 21. *Possession as evidence of title*: 3 Strob. 473; 91 S. C. 234; 74 S. E. 506. *Marriages of slaves and colored people*: 13 Stats. 31; Code of 1872, p. 768; 1 Code 1912, 3755, 3756; 63 S. C. 237; 36 S. C. 454; 33 S. C. 66.

*Messrs. John H. Clifton and H. Harby*, for respondent.

April 21, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This was an action for partition brought by the plaintiff against defendant. The complaint alleged that the plaintiff and defendant were tenants in common of a certain tract of land, and defendant was wrongfully withholding plaintiff's part after renting the same from him, and refused to let him enter and enjoy his part, and claims title to the whole. The answer denies the allegations of the complaint, and alleges title in the defendant, and alleges peaceable possession in herself for more than 20 years, claiming it as her own, and holding it adversely to every one. The cause was heard before his Honor, Geo. W. Gage, and a jury, at the June

REP.]

November Term, 1918.

term of the Court, 1913, for Sumter county. At the close of plaintiff's evidence a motion for nonsuit was made and refused. Later, when all the testimony was in, his Honor did not direct a verdict, but held that he was satisfied from the evidence in the case that the relationship in which plaintiff's parents lived was that of concubinage, and that there was no inheritable blood; and he passed an order dismissing the complaint. From this order, plaintiff appeals, and by five exceptions complains of error and asks reversal.

It is not necessary to take the exceptions up separately. If there was any competent, pertinent, relevant testimony to make out the plaintiff's case, it should have been submitted to the jury. If the testimony of the plaintiff is to be 1, 2 considered at all, and is worth anything at all, then he made out such a case that the jury should have passed upon the case. What credence they would have given to his testimony, or what effect it would have had with them, it is not for the Court to say. He testifies that his father and mother lived together as man and wife in slavery times, and that the marriage ceremony was performed, and that after freedom they continued to live together as man and wife, and that he was recognized as a son, by his father, Jerry Maples, and that he lived with his father until he married, and that his mother was Rebecca, and she afterwards married one Robinson; that his father lived off and on with another woman, Minda, during slavery times and after the war; that his mother, Beckey, had three children, himself, and the defendant, and a daughter, Celia; that Celia had a son named London, Jr.; that Celia is dead; and that London, Jr., died seized and possessed of the land in dispute, and that at his death his grandmother, Beckey (the mother of plaintiff and defendant), went into possession of the land and remained in possession for about 10 years, when she died, and then the plaintiff and his sister, the defendant, went into possession, and he rented his part to his sister, and for years she paid the taxes on it under an agreement between them,

and promised to pay him rent for his part, some of which rent she paid. Under the evidence in the case the jury could have drawn more than one inference. It is not for the Judge to decide questions of fact in a case which are proper for the jury to determine. There was sufficient testimony in the case for the jury to say whether the father and mother were married legally, or whether they lived together in concubinage; whether or not he was the son of a slave by a woman in concubinage, or whether he was the offspring of a legal marriage; and whether or not his father as a slave was morally married to his mother, and lived with her as such, as his wife, after emancipation. As to what is necessary in cases of this character is laid down in *Childs v. Childs*, 93 S. C. 427, 77 S. E. 50, and cases therein cited.

There was some evidence that by agreement between plaintiff and defendant there was an express contract that defendant was to pay plaintiff rent, thereby creating the relation of landlord and tenant. If there was such  
3 an agreement, and the relation of landlord and tenant is established, the defendant would be estopped from disputing plaintiff's title. It was not for the Court to determine these vital questions, but the jury. There was sufficient evidence in the case for the jury to determine, and his Honor was in error in holding otherwise and dismissing complaint. Judgment reversed, and a new trial granted.

MR. JUSTICE GAGE did not sit in this case.

8808

ELEAZER *ET AL.* *v.* SHEALY, CLERK OF COURT.

(81 S. E. 648.)

JUDICIAL SALES. CHECK AS PAYMENT. NEGLIGENCE IN COLLECTING CHECK. SUFFICIENCY OF EVIDENCE. HARMLESS ERROR.

1. In an action by the purchaser of land at a judicial sale, claimed to have been paid for by giving a check to defendant clerk of Court, which he failed to diligently present for payment before the bank had become insolvent, to compel defendant to make title to the land to plaintiff, evidence *held* to sustain a finding that the clerk received the check to collect it for plaintiff, and not as payment, and that he made reasonable efforts to collect the check.
2. The judgment will not be reversed because of any errors which are not shown to have been prejudicial to appellant's rights.

Before SHIPP, J., Lexington, June, 1913. Affirmed.

Action by Sarah C. Eleazer and husband against Frank W. Shealy, clerk of Court of Common Pleas and General Sessions for Lexington county and special referee. From a judgment for defendant, plaintiffs appeal. Affirmed.

The Circuit decree, appealed from, was as follows :

Sarah Eleazer and her husband, H. H. Eleazer, complaining of F. W. Shealy, clerk of Court of Lexington county, allege that certain lands belonging to J. T. Bouknight, deceased, were sold by said clerk of the Court under an order of Court, signed by Hon. J. W. DeVore, Circuit Judge, and that said sale took place on sales day in February, 1912, said lands being described in the petition; that said lands were bid off by Walter Looney, for the price of four hundred and forty dollars and thereafter said Looney for value, to wit, in consideration of an agreement to pay him the sum of five hundred dollars, duly assigned said bid to petitioner, Sarah C. Eleazer, and authorized the clerk of the Court to make title therefor to said petitioner; that on the 22d of February, H. H. Eleazer, the husband of Sarah



C. Eleazer, acting for her, paid to the clerk and special referee the sum of five hundred dollars in accordance with the agreement with Looney and in full payment of the purchase price of the tract of land; that payment was made to the clerk by giving him a cashier's check on the Lexington Savings Bank, which it is alleged the clerk received and accepted as payment, and for which the clerk executed a receipt as follows: "Lexington, S. C., 2-21-1912. Received from H. H. Eleazer five hundred and no-100 dollars, payment on tract No. 4 in Bouknight estate, deed to be executed to S. C. Eleazer. \$500.00. (Sd.) Frank W. Shealy, C. C. C. P. & G. S."

That the petitioner heard no more from the clerk until about the 27th day of March, 1912, when he received notice from the clerk that he was unable to collect check; that in the meantime, to wit, on the 23d of March, Lexington Savings Bank, which is situated at Lexington Courthouse, failed in business and a receiver was appointed, the bank having been declared insolvent, and that this happened after the clerk had a reasonable time in which to have collected the check; it further alleges that failure of the clerk to collect the check was due to his negligence, and petitioners pray that the Court require the clerk to execute to Sarah C. Eleazer title to said tract of land.

The answer of the defendant, Shealy, clerk, admits that the land was sold under order of Court on sales day in February, 1912, and that the same was bid by Walter Looney and his bid transferred to Sarah C. Eleazer, and that the clerk was authorized to make title therefor to Sarah C. Eleazer. The answer sets up by way of defense that soon after the sale and assignment of the bid, H. H. Eleazer offered him a check drawn by one Riddle, in favor of either H. H. Eleazer or Sarah C. Eleazer, for the sum of five hundred dollars in payment of the assigned bid, but that he refused to receive it for the reason that he had been having trouble with checks from said bank and he would not take "

REP.]

November Term, 1918.

said check; that later on in the same day H. H. Eleazer returned with a cashier's check on the Lexington Bank, and offered it to the defendant in payment of said bid, but defendant refused to accept it as such payment, but agreed to take it and try to collect it, and if he could do so, he would credit the amount on the bid. That defendant presented the check or draft to the bank for payment on the same day it was received and on the subsequent day, and made several other attempts to collect it and failed to collect it; that at no time after he received the check for collection was the bank in a condition to pay it. That the defendant gave Eleazer a receipt for the check in order that the said Eleazer have something to show for the check to the defendant; that as soon as defendant found that he could not collect the check he wrote several letters to Eleazer, informing him of his inability to collect the same. Defendant admits that he has refused to make title under the circumstances.

The testimony in this case is very conflicting. If the clerk was negligent in his dealing with the check, and if he failed to collect it on account of his want of diligence in presenting the check for payment, or if in the first instance he received the check in payment, then the loss would fall on the clerk. If, however, the clerk received the check not in payment, or if he used due diligence in collecting the check, or in presenting the check, then the loss must fall on the Eleazers. The testimony is very conflicting. I know personally most of the witnesses on behalf of the defendant, while I am unacquainted with most of the witnesses for the petitioner. After considering all of the testimony, I am satisfied that Mr. Shealy received the check not in payment of the money, but received it for the purpose of collecting the check for the petitioners, and, if collected, to apply it to the purchase price of the land. I am, therefore, satisfied from the testimony, that the bank was in bad condition at the time and that Mr. Shealy made reasonable efforts to collect the check and failed. He wrote several

letters to petitioner, H. H. Eleazer, informing him of his inability to collect the check, notifying him of his effort to collect the same. It is true that the letters were not sent to the correct postoffice address of Mr. Eleazer, and it may be on that account that Mr. Eleazer had no notice, still, Mr. Shealy acted in good faith and the fact that he wrote the letters and endeavored to notify Mr. Eleazer, bear forcefully upon the question of his diligence in reference to the check. If the check was refused payment by the bank, in the hands of Mr. Shealy on account of its embarrassed condition, I can not see that Mr. Eleazer would have met with greater success, had he himself known of the situation and had attempted to collect the check himself. I think that the check was not paid because of the condition of the bank and that the loss should not fall upon the clerk of the Court. It is, therefore, ordered that the petition be, and the same is hereby, dismissed.

*Mr. D. W. Robinson*, for the appellant, cites: *Conditional receipt of check*: 83 S. C. 205-7; 90 S. C. 543. *Diligence in presenting check*: 22 L. R. A. 788, 789; 2 Morse Banking (4th ed.), sec. 421(c); 69 S. E. 1014-15; 32 L. R. A. (N. S.) 991; 4 Am. St. Rep. 844; 62 Mich. 199; 47 Am. St. Rep. 406, 413; 79 Md. 312; 32 Am. Dec. 527; 20 Wend. 192; 49 Am. St. Rep. 47, 53; 103 Ala. 45-8; 52 S. E. 1017; 4 L. R. A. (N. S.) 135; 5 Am. & Eng. Enc. of L. 1040-1042; 2 Daniel Neg. Instruments, secs. 1590-1; 2 Morse Banking (4th ed.), sec. 423. *Diligence in giving notice of nonpayment*: 2 Morse on Bank and Banking, sec. 421(b), (c), 422; 77 Am. St. Rep. 620-622; 52 S. E. 1017; 4 L. R. A. (N. S.) 135. *Question of diligence, one of law*: 47 Am. St. Rep. 408; 79 Md. 312; 51 Am. St. Rep. 92, 93; 95 Ga. 376. *Duty where unsafe condition of bank is known to holder of check*: 69 S. E. 1016; 32 L. R. A. (N. S.) 993; 79 N. W. 859; 80 N. C. 31; 2 Morse Banks and Banking, sec. 421 (i). *Place to give notice*: 2 *Ib.*, sec. 428. *Discharge of drawer*

REF.]

November Term, 1918.

*and indorser*: 2 *Ib.*, sec. 421 (a), (b), (d), (i), 422, 423; 5 Am. & Eng. Enc. of L. 1031, 1045; 2 Daniel on Neg. Insts. (5th ed.), secs. 1496, 1587; 6 Wend. 445; 15 L. R. A. (N. S.) 213, note. *Holder failing to notify drawer must shoulder the loss*: 2 Morse Banks and Banking, sec. 421 (i), (d); 41 Am. St. Rep. 92, 93; 49 Am. St. Rep. 45; 5 Am. & Eng. Enc. of L. (2d ed.) 1013, 1044. *Burden of proof*: 22 L. R. A. (N. S.) 788, 789; 2 Morse Banks and Banking 421 (b), (c) and (f).

*Mr. C. M. Efrd*, for the respondent, cites: *Due diligence a question of fact*: 13 S. C. 343; 11 S. C. 454; 3 Hill L. 77.

April 21, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

The facts herein are stated in the decree of his Honor, the Circuit Judge.

In his findings of fact, he says: "After considering all the testimony, I am satisfied that Mr. Shealy received the check, not in payment of the money, but received it for the purpose of collecting the check for the petitioners,  
1 and, if collected, to apply it to the purchase price of the land. I am therefore satisfied from the testimony that the bank was in bad condition at the time, and that Mr. Shealy made reasonable efforts to collect the check and failed." The appellants have failed to satisfy this Court, by the preponderance of evidence, that these findings were erroneous.

Having reached this conclusion, the petition should be dismissed, for the reason that, even if the decree was erroneous in any other respect, it has not been made to  
2 appear that the error was prejudicial to the rights of the appellants.

Judgment affirmed.

WATTS, J., concurs in the opinion of the Chief Justice.

MR. JUSTICE FRASER, *dissenting*. Stripped of useless complications, the case is as follows: Mr. Shealy, as clerk of the Court of Lexington county, sold a tract of land and was requested to make title to Mrs. Eleazer. Mr. Eleazer offered in payment a check by one Riddle, drawn on Lexington Savings Bank, for \$600. Mrs. Eleazer was to pay \$500 for the land. Mr. Shealy was asked to take the check as cash and give his own check for the difference. This Mr. Shealy refused to do. Mr. Eleazer went off and returned with a cashier's check of the Lexington Savings Bank for the \$500, as follows: "No. 1034. Lexington, S. C., February 21, 1912. Pay to the order of H. H. Eleazer \$500.00 (five hundred and 00-100 dollars). Not over five hundred (\$500.00). (Signed) W. P. Roof, Jr., Asst. Cashier. Cashier's Check." This Mr. Shealy took and gave a receipt that read as follows: "Lexington, S. C., 2-21-1912. Received from H. H. Eleazer five hundred and no-100 dollars. Payment on tract No. 4 Bouknight estate, deed to be executed to S. C. Eleazer. (Signed) Frank W. Shealy, C. C. C. P. & G. S. \$500.00."

Mr. Shealy's own statement on the direct examination is as follows:

"Q. Mr. Shealy, what position do you hold—what office? A. Clerk of Court. Q. What office did you hold in February, 1912? A. Same. Q. You know Mr. H. H. Eleazer? A. Yes, sir. Q. Did he have any transactions with you as clerk of Court about the latter part of February? A. Yes, sir. Q. Now, can you fix the date about? A. Yes, sir. Q. What date? A. 21st February. Q. What transactions, what business? A. Mr. Looney had bought a piece of land at Bouknight estate sale, which piece of land was supposed to have been transferred to Mr. Eleazer; the transfer was inaccurate and had just been returned by me, and on the 21st of February Mr. Eleazer came into the office to pay me for this land. Q. When was the same made? A. First Monday of February. I think the 4th; at any rate, first Mon-

day. Q. When he came in the office that morning to complete these transactions, how did he propose to make payment? A. He had a check from one Mr. Riddle for \$600. Q. What did he want you to do? A. Accept the check and give him my check for the difference. Q. What was the difference? A. \$100. Bid was \$500. Q. Did you do that? A. No, sir. Q. What was your reason? A. I told Mr. Eleazer it was not my habit to give my official checks in making change for private individual checks. I said there was no sense in my doing it, and 'you can attend to the matter yourself and save me the trouble and responsibility.' Q. What did he do? A. He said he would go to the bank. Q. Did he come back? A. Yes, sir; in about 30 minutes. Q. What did he have? A. A cashier's check on Lexington Bank. Q. For how much? A. \$500, payable February 21st, signed 'W. P. Roof, Jr., Asst. Cashier.' Q. The same check offered in evidence? A. Yes, sir. Same check offered in evidence. Q. What did he propose for you to do? A. Wanted me to execute a deed for that check to his wife, Mrs. Sarah C. Eleazer. Q. Did you do it? A. I told him I could not execute the deed until I realized on the check; in the next place that the bid had not been properly transferred to him, and he had not transferred it to his wife at all. Of course it could have been done, but Looney's transfer to Eleazer was not proper, and was out at that time. Q. Was there anything said to him by you with reference to the validity of the check? A. When I told him I would not execute the deed on the check until I had realized on check, he said, 'The check is as good as the bank.' I said, 'Yes, sir; I expect it is, but it is possible the bank is not what it ought to be.' Q. Did you say anything about getting the money? A. Yes, sir. He said the check was all right; and I said, 'If it is all right, just take it to the bank; I haven't even indorsed it.' Q. Did he do it? A. No, sir. Q. What was your condition of health at that time—first, what did you do with the check? A. I presented the check to Lexing-

ton Savings Bank for payment that afternoon, between 3 and 4 o'clock, before the bank closed. I went in the bank door myself. Q. Who did you present the check to? A. Young W. P. Roof. Q. What did he say? A. When I went in I pushed the check in the window. It had been my custom before to put the check in my bank book and pass over, but that time I just passed the check. He said, 'Where is your book?' I said, 'I do not want to deposit it; I want the money for it;' and I went on to explain to him why, and told him it was an estate in which a number of heirs were interested, and Mr. Graham held a mortgage on the premises, and I was expecting some trouble, and told him I was going to deposit the funds in another bank in a separate account. Q. Where was Mr. Roof when this conversation was going on? A. He was around in the side, back behind the railing. Q. How far from you? A. About the distance from me to you, say 10 feet. Q. Did he have anything to say about it? A. Why, when the conversation was going on between young W. P. and myself, he was over at the little red mahogany looking desk putting something in a book, and, about the time the conversation was over with myself and young W. P., Mr. Roof came over to where I was and was standing with his elbows propped up, looking over his glasses at me, and said, 'Why don't you deposit the check and check on us for what you need?' and I told him the circumstances. Q. What did he say? A. He said, 'It looks like some one is getting scared.' I told him I was not scared, but told him things were not as satisfactory as they ought to be. Those are my words almost verbatim. Q. Did he pay the check? A. He did not. Q. What did he say in reference to it? A. He said they were short of funds, and he intimated to me then that he was negotiating a loan; mentioned a loan between Roof and Barre Lumber Company. Q. Negotiating a loan? A. Yes, sir. Q. Did he say anything about what to do with the check—about bringing it back? A. I think he said he thought he would

REP.]

November Term, 1918.

be able to handle it in four or five days. Q. Did you go back? A. Yes, sir. Q. What occurred when you went back? A. Why, practically the same thing, except that I did not present it to young Roof; I went to Mr. Roof himself, went in a little office. He was very much riled up that morning; wanted to know if I was going to keep on depositing. Q. Well, what did he say about paying the check? A. He said that Roof and Barre matter would be completed in a few days; he did not say that they would pay it; said that they hoped to be able to pay it then. Q. Now, about what time intervened from the first presentation to the second presentation? A. I think, Mr. Efird, about a week. Q. About a week? A. Yes, sir. Q. Was there a presentation after that? A. Another after that. Q. What time was that? A. On the evening of the 12th of March, I think. I could not be positive as to the date. The same date that Mr. Roof came to my office to get funds, if I had any. It is the date that the \$750 deposit was made. Q. On that same date? A. Yes, sir. Q. What did he say with reference to it? A. Said they were so hard pressed, it was impossible to handle it then. Q. Well, did you go back again? A. I went back on the 4th, just before the bank closed—four or five days before. Q. What did he tell you then? A. I passed the check over to Mr. C. E. Leaphart, and he said, 'What do you want to do with it, deposit?' I said, 'Not by a whole lot; I want the money.' He said, 'You will have to see the Cap;' and I went in and had a conversation with Mr. Roof, in which he went over the situation pretty fully, and he told me then that, unless the Bank of Western Carolina would absorb his bank, there was no chance. Q. That was the first time he ever told you straight out? A. Yes, sir; that he saw no chance to reach bottom.

"Q. What was the condition of your health on the 21st? A. I was in bad shape. Q. What was the trouble? A. Abscess in both ears. Q. Was Court in session? A. Yes, sir. Q. Who was the Judge? A. Judge Prince. Q. On



the afternoon of the 21st, after this check was presented to the bank, what did you do or where did you go? A. To Columbia. Q. Who went with you? A. Mr. Haltiwanger and Mr. Luther Lorick. Q. Where is Mr. Lorick? A. In Columbia or Newberry, sometimes in one place and again in the other. Q. Now, did you have anything done for you in Columbia? A. Yes, sir. I have had my left ear operated on and my right ear chloroformed. Q. What condition in that night? A. As bad as a man could be. Q. And on the 22d? A. In bed all day; had a trained nurse. Q. On the 23d? A. I was in bed until late in the afternoon. Q. On the 23d your condition was such that you could not attend to business? A. My recollection is that I did come to the courthouse upstairs that evening. Q. Well, now, on the 24th, what was your condition? A. I came to the office about 11 o'clock on the 24th. Q. Well, did you do anything on that day with reference to this matter? A. The very first thing I did on coming into the office was to write Mr. Eleazer a letter. Q. In what sort of an envelope did you inclose the letter? A. Official size, clerk of the Court's envelope, with return printed on the left. Official size about  $3\frac{1}{4} \times 10$ . Q. Has that letter ever come back to you? A. It has not. Q. To whom was the letter addressed? A. H. H. Eleazer, Chapin, S. C. Q. Why did you address the letter to Chapin? A. I thought Mr. Eleazer lived in the Spring Hill section, and, as such, I knew he was served by the route served by Mr. Walter Eleazer. The routes have changed; route originally went out from Peak. Q. You thought he was on that route? A. Yes, sir; I knew he lived down in the fork. Q. You never got your letters back? A. None whatever. Q. What was in the letter? A. I notified Mr. Eleazer that I had presented the check for payment, and up to that time had failed to collect, and asked him to what postoffice to mail the check. Q. Did you keep a copy? A. No, sir. Q. Were you keeping copies of letters at that time? A. None at all. Q. Did you afterwards write

REP.]

November Term, 1918.

another letter? A. I afterwards wrote another letter to Chapin, to the same place. Q. How long a space intervened between the first and second? A. I think it was a day or two after I had made the first presentation; I made the second presentation of the check before I figured on Mr. Eleazer having time to answer my letter. Q. When you made the second presentation, you had written the second letter? A. Yes, sir. Q. What sort of an envelope was that letter inclosed in? A. Same kind. Q. Did that letter come back? A. No, sir. Q. What was in that letter? A. Why, practically the same thing; that I had repeatedly tried to realize on the check, and up to this time I had failed, and, knowing the circumstances as I did, I suggested to him to come over at once and look after the matter himself. Q. You got no response? A. No response. Q. What did you do in reference to the matter? A. I waited long enough to hear from him, and I did not hear, and I called up Mrs. Hiller, central at Chapin. Q. Mrs. Nannie Hiller? A. Yes, sir; I asked Mrs. Hiller if I could reach Mr. Eleazer over the phone. She said I could not. I told her that I had repeatedly written Mr. Eleazer concerning some very important matter, and had been unable to get a reply. Mrs. Hiller asked me where did I write. I said Chapin, and she told me if I would write to Irmo I could reach Mr. Eleazer. She explained that the two routes came very close together from Chapin and Irmo. Q. She said that you could reach Mr. Eleazer at Irmo? A. Yes, sir. Q. Could you fix the time you got the information from her? A. About the 23d or 24th of March, about the time the bank closed. Q. Immediately upon information, what did you do? A. I wrote Mr. Eleazer again. Q. That letter is the one in evidence? A. Yes, sir. Q. After writing that letter on the 21st of March, how long after that time before Mr. Eleazer came here? A. My recollection is it was the 2d day of May. I never heard a scratch from him. Never answered any letter at all, and did not come until the day the creditors of the bank met.

"Q. Now, what disposition was made of the check at that time? A. He came in to see me, and I told him what I had done, and he said, 'Let me have the check.' I said, 'All right, it is your property, and has been your property;' and I gave him the check. He must have been gone out an hour or two. He came back to me with the same check, and he said, 'I have seen Mr. Roof, and I think he told me he had seen you and Mr. Timmerman,' In fact, I feel sure that he said that. He said, 'I want to leave the check with you.' I said, 'I cannot and would not assume the responsibility.' He said he did not mean that; that he had talked with Mr. Roof, and he said he would pay. Said Roof said he was worth enough to pay dollar for dollar. Q. What did he do with the check? A. Left it with me, and I put it in the safe. Q. And you presented it? A. Yes, sir. Q. Now, you made some deposits at this bank on March 2d, the books show, of \$750? A. I did; yes, sir. Q. Now, Mr. Shealy, on what condition or under what circumstances was that deposit made? A. Mr. Roof came to my office in the latter part of the day, late in the evening, and took me in the vault and asked me to give him a couple thousand dollars on some other bank, and I told him I could not. He said, 'Haven't you got some checks you could give me?' I said: 'Yes, but I cannot give them to you. I am going to deposit the checks in some other bank.' I said: 'I have one for \$750, brought by Mr. C. S. Rauch on your bank paid to me by Perry Harmon for share in partition case of — v. —. I have been unable to get over to the bank today, and if you agree to pay me Mrs. Fox's check I will agree to deposit it.' He said, 'Of course we will do it;' and I made the deposit. Q. You checked on it? A. Yes, sir. Q. With what result? A. I got one check of four hundred and something— Q. Out of the \$750 you lost all except \$468.54, after he promised to pay it? A. Yes, sir; after I told him I could not get other banks to take check. Q. They have a deposit of \$506.87 March 12th? A. That is the deposit I referred to

REP.]

November Term, 1918.

as \$450; I got the amounts mixed. Q. You mean to say, after having made the \$750 deposit and checked on it, they came and told you they could not pay unless you came back and made another deposit? Then you gave the \$506.87? A. Yes, sir. Q. After that they did not pay it? A. No, sir. Q. You lost that deposit and the other? A. Yes, sir. Q. You have had to pay these amounts? A. Yes, sir. Q. Did you have any conversation with Samuel P. Roof in reference to paying checks? A. He said; 'There was no use to draw any more checks on us unless you give us some money.' Q. Can you fix about what date? A. I think it was about 11th or 12th of March. I asked him, 'What about the Roof & Barre loan?' and said, 'I thought the loan would put you people easy;' and he said it was practically all gone. Q. Practically all gone? A. Yes, sir; he said practically all gone. Q. Did they tell you the amount of the Roof & Barre loan? A. Yes, sir. Q. How much? A. \$20,000. Q. About the 11th or 12th they told you it was all gone? A. Sam told me. I called his attention to his turning down check after I had deposited money. Q. Now, I have on my notes something about some Cullum checks; what was that? A. Some time in February, I think, about the 18th, before this cashier's check matter came up; that was not the first intimation, but the most substantial information, I had that the bank was beginning to get in bad condition. Mr. Cullum sent me three checks and wrote me a personal letter in which he said, 'Please try to collect these checks.' I think the letter and checks have been returned to Cullum. Q. You received three checks from Cullum on Lexington Savings Bank to collect? A. Yes, sir. Q. What did you do with them? A. I presented them. Q. That was some time in February? A. Yes, sir. Q. Presented over the counter of bank? A. Yes, sir. Q. Were they paid? A. They were not."

On the 21st February Mr. Shealy received the check. It appears that he had doubts about the check, and Mr. Eleazer

had none. The check was payable that day, and was that day presented for payment and not paid. Mr. Shealy was sick on the 22d and 23d. On the 24th Mr. Shealy again presented the check, and again it was not paid. On that day (24th) Mr. Shealy wrote to Mr. Eleazer at Chapin, notifying him of the nonpayment. Mr. Eleazer's postoffice was Irmo. About the time the bank closed up Mr. Shealy made inquiry as to Mr. Eleazer's postoffice, and actually gave him notice of the nonpayment. The check has never been paid. The question is: Who shall lose the \$500, Mr. Shealy or Mr. Eleazer? There is no use to consider the questions of conflict of testimony. It is true there are in these cases two questions, one of law and the other of fact, but the question of fact is a mere conclusion from facts that are not in controversy. Mr. Shealy presented the check for payment, and it was not paid on 21st February; there was no evidence that any attempt was made to give notice of nonpayment until the 24th February. Was that sufficient notice as a matter of law? Our cases hold that it is not. It is true Mr. Shealy was sick, but he was attending to business and presented the check. See *Scarborough v. Harris*, 1 Bay, 178, 1 Am. Dec. 609: "(1) Although it may not be necessary, in some cases, to give drawer notice of protest, as where drawer had no effects in drawee's hands (Doug. 55), yet this rule will in no case apply to an indorser (5 Burr. 2607). For, in all cases whatever, the holder of a bill must give reasonable notice to the indorser; that is, by first post or convenient opportunity, which is partly a matter of fact for jury what is reasonable or not. Doug. 499. (2) Wherever a new credit is given, the party holding takes it upon himself; and in no case where the holder gives time for payment to the maker is the indorser liable. 1 Term Rep. 167, 714; 1 Well. 48."

It is very manifest that Mr. Shealy withheld his hand on account of the promise of Mr. Roof to raise the money on a loan. There has been no change of the law. See, also,

*Diercks v. Robertson*, 13 S. C. 343, where it is said: "Whether due diligence was used in ascertaining the post-office of the defendant was a question of fact for the jury; but when the fact of residence was ascertained, or when due diligence had been employed in endeavoring to ascertain such fact, the question of diligence in giving the notice is a question of law, upon which it was the duty of the Court to have instructed the jury."

Did Mr. Shealy use due diligence? Mr. Shealy trusted to his memory, and his memory was in error. He had two effective methods of finding out the correct postoffice: The telephone, which did furnish the correct postoffice; and the county treasurer's books near at hand. Mr. Shealy had been county treasurer and knew that the books contained the postoffice. Memory is treacherous and is so regarded in law. We cannot hold that Mr. Shealy used due diligence.

MR. JUSTICE HYDRICK concurs with Mr. Justice Fraser.

The Supreme Court being equally divided, the judgment of the Circuit Court was affirmed.

MR. JUSTICE GAGE did not sit in this case.

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8813

DOBEY *ET AL.* v. WATSON.

(81 S. E. 658.)

CONTRACTS. BUILDING CONTRACTS. PAYMENTS. CONDITIONAL CERTIFICATES. NONSUIT.

A building contract providing for payments being made to the contractor on certificates of the architects, a nonsuit should be granted, in an action by the contractor for money certified by the architects to be due, their letter to him accompanying the certificate, given before it was due under the contract, providing, "this certificate is

given with the understanding that you are to let W. (the owner) have immediate possession of the house," and he not having given immediate possession, but for weeks kept and refused to give up the keys.

Before BOWMAN, J., Lexington, February, 1913. Reversed.

Action by W. F. Dobey and James C. Dobey, copartners, under the firm name of W. F. Dobey & Son, against Mrs. P. B. Watson, on a building contract. The pleadings were as follows:

The plaintiffs, complaining of the defendant, allege:

1st. That the defendant is a citizen and resident in the county and State aforesaid.

2d. That on the 4th day of March, 1911, the plaintiffs and the defendant entered into a written agreement whereby the plaintiffs were to build and erect for the defendant a certain dwelling house upon terms and conditions named in agreement, a copy of which said agreement the defendant now has, so plaintiffs are informed, believe and allege.

3d. That among other things the said contract provided that the defendant pay to the plaintiffs certain sums of money in current funds for the building and erection of said dwelling house upon the certificates which were to be issued by the architects named in said contract, to wit: Shand & LaFaye; and it further provided that all payments should become due when the certificates for the same were issued, as aforesaid.

4th. "That subsequent to the making of said contract and while said building was in the course of construction, on the 26th day of September, 1911, the defendant by and through her husband and agent, P. B. Watson, agreed by and with plaintiffs in the presence of defendant's architect, Mr. G. E. Shand, to pay to the plaintiff the sum of seventeen hundred and fifty dollars upon a certificate which was to be issued by Shand & LaFaye, architects, and that plaintiffs were to give

REP.]

November Term, 1918.

defendant the possession of the house pending its completion, and it was further agreed that upon the final completion of dwelling the architects were to pass upon and adjust all other claims that each might have against the other, and plaintiffs did all that was required of them by said agreement; and that pursuant to said agreement the said Shand & LaFaye did issue a certificate payable to the plaintiffs by the defendants for seventeen hundred and fifty (\$1,750) dollars, dated September 27, 1911, in form as follows:

\$1,750. Columbia, S. C., September 27, 1911.

To Mrs. P. B. Watson: W. F. Dobey & Son is entitled to the part payment of one thousand seven hundred and fifty 00-100 as per contract for erecting residence. Shand & LaFaye, Engineer & Architects. Per George E. LaFaye. Amt. certificate \$1,750.

5th. The said certificate was duly and promptly presented to the defendant for payment, and notwithstanding her valid agreement to pay said certificate, properly executed and presented for payment, she has failed and refused to pay the same, and the plaintiffs are now entitled to receive of the defendant the full and just sum of \$1,750, together with interest at the legal rate from the 27th day of September, 1911.

Wherefore, plaintiffs pray judgment against the defendant in the sum of \$1,750, and interest at the legal rate from the 27th day of September, 1911, for the costs and disbursements of this action, and for such other relief as may appear to the Court to be just."

The defendant, through her attorney, Joseph L. Nettles, answering the complaint in the above named cause,

As a first defense: 1. Admits the allegations of paragraphs 1, 2 and 3.

2. Admits so much of paragraphs 4 and 5 as states that a certificate was issued by Messrs. Shand & LaFaye, archi-



fects, in the terms as stated in the complaint, but denies that such certificate was issued in pursuance and under the terms of the contract entered into March 4, 1911; and alleges that if such certificate was issued under and in pursuance of the terms of the contract it was done mistakenly and wrongfully.

As a second defense: 1. Defendant alleges that on the 4th day of March, 1911, the plaintiffs and defendant entered into an agreement whereby plaintiffs were to build and erect for the defendant a certain dwelling house upon terms and conditions named in the agreement, a copy of which said agreement plaintiffs now have, so defendant is informed and believes.

2. That one of the stipulations contained in the said contract was that 15 per cent. of the money due by defendant to plaintiffs for work done on the said building should be withheld by defendant as owner, until the building was completely finished and the final certificate thereof given. That pursuant to such stipulation 15 per cent. of the money due plaintiffs were being withheld on September 26, 1911. That the work still being incomplete, up to that time, the architect had refused to issue further certificates to plaintiffs because of this stipulation. That on September 26, 1911, defendant had a great part of her household furniture in storage in neighbors' homes and in the depot of the town of Batesburg, county and State aforesaid, where the said building is located, and was very desirous of removing her furniture from said storing places and of storing the same in her own house on that day. That plaintiffs held the keys to the house and refused to allow defendant access to the house for the purpose of storing said goods. That in order to immediately get possession of the said dwelling, and to obviate further dealings with plaintiffs, defendant on September 26, 1911, entered into agreement with plaintiffs whereby plaintiffs agreed to give defendant possession of the said house on that day, and defendant agreed that in consideration of

this her claim for demurrage should cease on September 26, 1911, and that she would take over the house and complete the said work at her own expense, and would pay plaintiffs seventeen hundred and fifty (\$1,750) dollars in full satisfaction of the contract entered into March 4, 1911, when the architect should issue a certificate therefor, as a final certificate under the said contract. That defendant was ready and willing to carry out her part of the said agreement, but that plaintiffs, in violation of their agreement, refused to allow defendant access to the said building on September 26, 1911, and thereby forced defendant to go to the extra trouble and expense of obtaining another building and storing her goods therein, and that on September 18, 1911, when plaintiffs did present a certificate for seventeen hundred and fifty (\$1,750) dollars, it was not a final certificate, as the parties had agreed on, but purported to be only for a partial payment. That plaintiffs not having complied with the agreement of September 26, 1911, in two ways, viz., in not giving defendant possession on September 26, 1911, and by presenting a certificate that was not issued according to the terms of the said agreement of September 26, 1911, defendant refused to pay the certificate.

3. That defendant is and always has been ready and willing and anxious to carry out her part of the contract entered into March 4, 1911, and has frequently so expressed herself to plaintiffs, but that they continue to neglect and refuse to do so on their part.

As a third defense by way of counterclaim: 1. Defendant alleges that on the 4th day of March, 1911, plaintiffs and defendant entered into a written agreement whereby plaintiffs were to build and erect for defendant a certain dwelling house, upon the terms and conditions named in the agreement, a copy of which agreement plaintiffs now have, so defendant is informed and believes.

2. That among other things the said contract provided as follows:

"Art. VI. The contractors shall complete the several portions, and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, to wit: "The whole work to be completed by August 1, 1911, and should the contractors fail to complete the work by that date they shall forfeit to the owner, by way of liquidated damages, five (\$5) dollars for each and every day the work remains uncompleted."

3. That defendant has insisted and frequently demanded of plaintiffs that they comply with the terms of the said agreement, but that plaintiffs have neglected and refused to comply with the said agreement and failed to carry out its provisions in very material parts, so that defendant has been put to great trouble and expense and has been deprived of the benefits of a comfortable home; whereby she has been damaged in the sum of one thousand and sixty (\$1,060) dollars.

Wherefore the defendant demands judgment, first, that the complaint be dismissed with the cost to the plaintiffs; second, that the defendant have judgment against the plaintiffs for the sum of one thousand and sixty (\$1,060) dollars, and for the costs of this action.

The plaintiff served a reply to the counterclaim in the answer denying its allegations.

At the conclusion of the testimony defendant moved for a nonsuit of the plaintiffs' action, and the direction of a verdict in favor of defendant for \$5 a day from August 1st to November 15th, the plaintiff and the witnesses having testified that the plaintiff kept the keys to the house on defendant's land for the purpose of forcing a payment by defendant, and she was thereby deprived of the use of her home until the keys were delivered to her, November 15; and such damages are called for by the contract of March 4, 1911.

Defendant's motions were refused, and the case submitted to the jury, who returned a verdict of \$1,750 in favor of the

REF.]

November Term, 1918.

plaintiff, whereupon, in accordance with the verdict, a judgment was entered for plaintiff for said amounts and costs. From the rulings of the Court, the verdict, and the judgment entered thereupon the defendant appealed upon the following exceptions:

1. That his Honor erred in refusing defendant's motion for a nonsuit or direction of verdict at the close of plaintiff's testimony, said motion being on the following grounds:

(a) That the testimony produced by plaintiff showed conclusively that there was no consideration to support the alleged contract; and,

(b) That assuming that there was such consideration for said alleged agreement, the testimony produced by plaintiff showed conclusively that plaintiff was to perform his part prior to defendant performing hers, that plaintiff had refused to perform his part of said agreement at the proper time, and the plaintiff being in default the defendant had a right to repudiate the agreement, this being a breach *in limine*, and the defendant having also changed her position in the meantime; it being respectfully submitted that there was no evidence of any consideration upon which a contract giving a cause of action could be based; and even if there was the plaintiff had breached it prior to the time of defendant's duty to perform.

2. That his Honor erred in refusing to grant defendant's motion for a direction of verdict for liquidated damages of \$5 per day from August 1 to September 26, it being respectfully submitted that such a motion was proper since the plaintiff himself and all the witnesses had admitted that the house was uncompleted on that date, and the contract having provided for such liquidated damages.

3. That his Honor erred in refusing to grant defendant's motion for a direction of verdict on the counterclaim for \$5 per day liquidated damages from August 1 to November 15; the plaintiff and the witnesses having testified that the plaintiff kept the keys to the house built on defendant's land for

the purpose of forcing a payment by the defendant and she was thereby deprived of the use of her house until the keys were delivered to her, November 15; the contract having provided for such liquidated damages.

*Messrs. Welch, Nettles & Tobias*, for appellant, cite: *The alleged subsequent parol contract was without consideration*: 2 Spears 585, \*697; 1 Strob. L. 329; 67 Am. Dec. 328; 1 E. D. Smith (N. Y.) 687, 689. *Performance of building contracts*: 6 Cyc. 53; 27 Mich. 312; 66 Wis. 326. *Liquidated damages for delay*: 5 Strob. 115; 67 S. C. 456; 22 Pac. 126.

*Messrs. Thurmond, Timmerman & Callison*, for respondents.

April 22, 1914.

The opinion of the Court was delivered by Mr. JUSTICE FRASER.

The appellant desired to build a home and employed the respondent to do the work under a written contract. The payments were to be made on certificates signed by the architects. Under the terms of the contract, 15 per cent. was to be withheld until the contract was completed. Before the completion of the contract, while some small things remained undone, the plaintiffs wanted to get some of the 15 per cent. reserved. The architect refused to issue the certificate, unless the defendant consented. The respondents allege that the defendant did consent, and the architect issued a certificate for \$1,750 as part payment. The case was tried before Judge Bowman. At the conclusion of the plaintiff's evidence the defendant moved for a nonsuit. This motion was refused.

There are several exceptions; but that which complains of the refusal to grant a nonsuit is the only one that need be

considered, inasmuch as that motion ought to have been granted.

The plaintiff admits that there was a written contract, and by the terms of that contract he was not entitled to the certificate sued on, and alleges a parol contract to pay the \$1,750, and claims that the certificate must be paid under the parol contract. The defendant denies the parol contract, as set out by the plaintiff, and claims that, even if there was a parol contract, it cannot avail the plaintiff, because a written contract cannot be varied by parol.

There is much confusion in the testimony reported in the case; but there are two things that are clear. The letter of the architects, transmitting the certificate, contains the following: "This certificate is given with the understanding that you are to let Mrs. Watson have immediate possession of the house." It is also clear and undisputed that the plaintiffs did not "let Mrs. Watson have immediate possession of the house." It is true the plaintiffs' evidence shows that they made offer to let Mrs. Watson store some furniture in the house; but they kept the keys and refused for weeks to give them up.

There are several questions between the parties, and a final judgment in favor of either plaintiff or defendant, in an action like this, might work serious injustice to the other.

The judgment appealed from is reversed, and the nonsuit ordered.

CHIEF JUSTICE GARY and MR. JUSTICE WATTS concur.

MR. JUSTICE HYDRICK dissents.

MR. JUSTICE GAGE did not sit in this case.

8818

## SOUTHERN STATES PHOSPHATE CO. v. ARTHURS.

(81 S. E. 668.)

## APPEAL AND ERROR. CONSENT JUDGMENT. SALES OF FERTILIZERS. EVIDENCE.

1. Defendant's consent to a verdict, after the Court had ruled that he could not introduce evidence in support of his defense, was not voluntary so as to deprive him of his right to review such ruling on appeal.
2. Under Civil Code 1912, sec. 2322, requiring every bag, barrel, or other package of fertilizers offered for sale or delivered after sale to have thereon a label or stamp setting forth the weight and chemical composition of its contents and the minimum percentage of specified ingredients guaranteed to be present, and a label giving the grade thereof, as high grade, low grade, or standard; and section 2329, providing that any vendor of commercial fertilizers whose goods shall fall short in commercial value guaranteed by the analysis appearing thereon when delivered shall be liable to the purchaser for the same per centum and selling price as the goods have fallen short, if fertilizers sold did not come up to weight and guaranteed analysis and were not actually delivered in kind according to contract, recitals, in a note for the purchase price as to the weight, that each sack bore the guaranteed analysis and inspector's tag, and in all respects complied with the law, and that the seller had neither impliedly nor expressly warranted the effects thereof on crops and an agreement therein that the buyer could not hold the seller responsible for practical results, were attempts to dispense with the statutory requirements and void, and did not preclude parol evidence of the noncompliance with statute.

Before GAGE, J., Aiken, October, 1913. Reversed.

Action by the Southern States Phosphate Company against John T. Arthurs. From a judgment for plaintiff, defendant appeals. The facts are stated in the opinion.

*Messrs. G. L. Toole & Son*, for appellant.

*Messrs. Gunter & Gyles*, for respondent.

REP.]

November Term, 1918.

April 22, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This is an action on a promissory note, executed by the defendant on the 23d of March, 1908, a copy of which is as follows: "\$198.00. On the first day of October next, fixed, I promise to pay to the Southern States Phosphate and Fertilizer Co., or bearer, one hundred and ninety-eight and 00-100 dollars. This note was given for value received in fertilizers furnished by said company, being for (90) ninety sacks of 200 pounds each, known as 10 sx acid 8x4, 10 kainit, 20 high grade and 50 sx standard. \* \* \* I hereby acknowledge that at the time of delivery to me, each sack of this fertilizer bore the manufacturer's guaranteed analysis of its contents, and also the inspector's tag, and that in all respects, the laws of the State have been complied with; and that the sellers of these fertilizers, have neither impliedly nor expressly warranted the effects of them on crops, and I therefore agree, that I cannot hold the said Southern States Phosphate and Fertilizer Co. responsible in any way for practical results."

The defendant denied the allegations of the complaint and set up the following as a defense: "The defendant alleges that he did not receive valuable consideration for the note given which was for fertilizers, and that the said fertilizers, bought, did not come up to weight and guaranteed analysis, and were not actually delivered in kind, according to contract, and that he therefore puts in a counterclaim for damages in the sum of \$100."

His Honor, the presiding Judge, practically ruled that the defendant did not have the right to introduce testimony to sustain the defense interposed by him, on the ground that it would be in violation of the rule that a written  
1 instrument cannot be varied or contradicted by parol evidence. The appellant's attorneys thereupon



announced that they would consent to a verdict, for the purpose of appealing to the Supreme Court from said ruling.

The case of *Publishing Co. v. Gibbes*, 59 S. C. 215, 37 S. E. 753, shows that consenting to a verdict under such circumstances is not to be regarded as voluntary, so as to deprive the defendant of his right to review said ruling on appeal.

The contract herein must be construed in connection with chapter 34, art. I, Code of Laws, 1912. Section 2322 thereof is as follows: "Every bag, barrel or other package of such fertilizers of commercial manures as above  
2 designated, offered or exposed for sale or delivered after sale in this State, shall have thereon a plainly printed label or stamp the letters and figures of which shall not be less than one inch in length, which shall truly set forth the name, location and trade-mark of the manufacturer, the number of pounds weight in such bag, barrel or package, also the chemical composition of the contents of said package and the minimum percentage only of any of the following ingredients guaranteed to be present, to wit, available phosphoric acid, nitrogen and its equivalent ammonia, the potash soluble in water; and on the opposite side or end, as the case may be, of every such bag, barrel or other package, there shall be another plainly printed label or stamp as a brand in Roman letters, the letters to be not less than two inches in length, giving the grade of each such package, according to the following schedule, that is to say, each package to be labeled 'High Grade,' 'Low Grade,' or 'Standard,' according to the following classifications: \* \* \*" Section 2329 thereof contains these provisions: That "any vendor of commercial fertilizers, manures or cottonseed meal whose goods or wares shall fall short in commercial value guaranteed by the analysis appearing on sack, bag or vessel holding the same when delivered to the purchaser, shall be liable to the purchaser for the same per centum, and selling price as the goods have fallen short in per centum of the

REP.]

November Term, 1918.

commercial value found upon analysis made of the goods: *Provided*, That if the fertilizer, fertilizing material falls short ten per cent. of the commercial value guaranteed by the analysis appearing on the sack, bag or vessel holding the same when delivered to the purchaser, that then the seller shall be liable to the purchaser for one-third of the selling value thereof, which amount is to be deducted from the amount of the buyer's indebtedness; and if the buyer has paid for the said goods, then the buyer can collect the same from the seller by due process of law."

The statute provides penalties for the violation of said sections.

If there was failure to comply with the statutory requirements, in the manner set forth in the defense interposed by the defendant, then a recital in the note to the contrary would be construed as an attempt to dispense with the statutory requirements, and therefore null and void, on the ground of public policy. This is clearly shown by Associate Justice (afterwards Chief Justice) McIver, who delivered the opinion of the Court in the case of *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845, in which similar statutes were under consideration. That decision is conclusive of the question under consideration.

Judgment reversed.

MESSRS. JUSTICES WATTS and FRASER concur. MR. JUSTICE HYDRICK, dissents.

MR. JUSTICE GAGE did not sit in this case.

8831

## BANKS v. FRITH

(81 S. E. 677.)

## APPEAL AND ERROR. EQUITABLE ISSUES. MORTGAGE. EVIDENCE.

1. An answer to a complaint for the possession of land conveyed by defendant to plaintiff which admitted the execution of a deed, but alleged that it was intended as a mortgage, and not an absolute conveyance, raised an equitable issue, upon which the findings by the trial Court can be reviewed.
2. In an action for possession of land, where the defense was that an absolute deed was intended as a mortgage, evidence *held* not clear, unequivocal, and satisfactory that the conveyance was intended as a mortgage, and therefore not sufficient to sustain a finding that it was so intended.

Before SHIPP, J., Abbeville, October, 1913. Reversed.

Action by Beulah Y. Banks against W. H. Frith. Judgment for defendant and plaintiff appeals.

The issues are stated in the opinion of the Court, as follows:

In order to understand this case, it is well to set out the complaint and answer.

The complaint is as follows:

"The plaintiff above named, by her attorney, Wm. N. Graydon, complaining of the above named defendant, alleges:

"I. That on the twenty-first day of November, 1904, the defendant made, executed, and delivered to the plaintiff, whose maiden name was Yarborough, for and in consideration of the sum of five hundred dollars to him paid by the plaintiff, a deed in fee simple, with general warranty, to the following described tract of land, to wit: 'All that tract or parcel of land, situate, lying, and being in Cedar Springs township, Abbeville county, in the State aforesaid, containing one hundred acres, and bounded by lands of J. R. Thorn-

ton, A. K. Watson, Larkin Frith, and others—the same being the east side of my home place upon which my residence is situated.’

“II. That this plaintiff, being at that time unmarried, did not demand exclusive possession of said land, but lived on it with the defendant, and continued to reside there the most of the time, until her marriage in June, 1911.

“III. That for the year 1912 the said defendant agreed to pay this plaintiff rent for said tract of land, which is reasonably worth two hundred and fifty dollars per year, but said defendant has failed and refused to pay said rent to this plaintiff. That the land of the plaintiff, from which this one hundred acres was cut, consisted of about one hundred and ninety-two and one-half acres, but the line between the defendant and the plaintiff has never been surveyed in accordance with said deed, and, when this plaintiff demanded that said land be run off to her, the defendant would not allow the line to be run north and south, so as to give the plaintiff the land she bought on the east side of said place, but attempted to run said line east and west, which does not give the plaintiff the land she bought.

“IV. That this plaintiff has demanded possession of said land, and demanded that the line be run so as to give her the land which she bought, but the defendant has refused to surrender possession of said land, and refused to allow the line to be run, as called for by plaintiff’s deed.

“V. That this plaintiff has been damaged by wrongful withholding of said land in the sum of two hundred and fifty dollars.

“Wherefore, the plaintiff demands judgment against the defendant:

“(1) That the Court order that one hundred acres of said land be surveyed by a surveyor appointed by this Court, on the east side of said tract of land, as called for by plaintiff’s deed.

“(2) That the plaintiff have judgment for the possession of said one hundred acres of land, and two hundred and fifty dollars, her damages for such withholding.

“(3) For the sum of two hundred and fifty dollars, rent for the year 1912.

“(4) For such other and further relief as to the Court may seem to be just and proper, and for the costs and disbursements of this action.”

The answer of the defendant is as follows:

“The defendant above named, answering the complaint herein, respectfully shows to the Court:

“I. Admits so much of the plaintiff’s complaint as alleges the execution of the deed therein described, but he denies the same was in fee simple, or that it was intended thereby to convey to the plaintiff the fee-simple title in the said tract of land. On the other hand, he alleges that the deed was made for the purpose of securing the sum of five hundred (\$500.00) dollars, then due the plaintiff by the defendant, and the understanding and agreement of the parties was that the said deed should be held as a mortgage to secure the repayment of the said sum of five hundred (\$500.00) dollars, and that, when the said debt was paid, the said deed was to become null and void.

“II. The defendant denies each and every other allegation of the plaintiff’s complaint.

“Further answering this complaint, this defendant alleges:

“III. That about November 1, 1904, the defendant herein borrowed from the plaintiff the sum of five hundred (\$500.00) dollars, money which she had received from a settlement of her mother’s estate, and, in order to secure the repayment thereof, this defendant executed to the plaintiff the deed described in paragraph I of the complaint herein under an agreement by and between the plaintiff and the defendant by which the said deed was to be held simply as a security of the said indebtedness, and this

defendant alleges that it was not intended thereby to convey a fee-simple title to the said tract of land.

"IV. The defendant further alleges that since the execution of the said deed he has paid the plaintiff, as interest on the said debt and sum of money and as part payment of the principal, the sum of three hundred seventy-seven and 72-100 (\$377.72) dollars, which amount was paid as follows: 1907, forty-four (\$44.00) dollars; 1908, forty (\$40.00) dollars; 1909, fifty (\$50.00) dollars; 1910, forty (\$40.00) dollars; 1910, fifteen (\$15.00) dollars; 1911, sixty-three (\$63.00) dollars; 1912, ninety and 72-100 (\$90.72) dollars; 1912, twenty-five (\$25.00) dollars. The defendant further alleges that the plaintiff is indebted to him for rent of another tract of land for the year 1912, in the sum of one hundred and twenty-five (\$125.00) dollars, which sum he pleads as set-off and counterclaim to the amount due by him to the plaintiff herein.

"V. This defendant further alleges that he has offered several times to pay to this plaintiff the balance due her on the said loan, and that he is still ready and willing to pay the same to the plaintiff, but the plaintiff herein, since her marriage, has demanded the possession of the said tract of land described in the complaint, in violation of the agreement between the parties, and that he has refused to give the same to her.

"VI. This defendant further alleges that at the date of the execution of the said alleged deed the land described therein was worth at least the sum of two thousand (\$2,000.00) dollars, and since the execution thereof neither the plaintiff nor any one for her every (*sic*) paid the taxes thereon or returned the same for taxation, nor rented the same, nor attempted to collect any of the rents thereof, but, in recognition of the said agreement between the parties, the plaintiff herein has held the said deed as a mortgage, and from time to time has collected interest thereon until after her marriage, when, for the first time, she

attempted to violate the said agreement, and attempted to return the said premises for taxation in her own name and get possession of the said premises from the defendant herein, contrary to the agreement between the parties.

"Wherefore defendant prays:

"(1) That the complaint herein be dismissed with costs.

"(2) That the deed described in the complaint be declared to be a mortgage to secure the indebtedness existing at the date of the said deed and thereafter, and that the Court will order an accounting of the amount, if any is due on the said mortgage debt, to the end that the defendant herein may pay the same to the plaintiff, and that the said deed be delivered up upon the said payment for cancellation.

"(3) That defendant herein have any other relief as to the Court seems equitable and just."

All issues of law and fact were referred to R. E. Hill, Esq., master for Abbeville county, who found for the plaintiff on all issues except as to rent. The cause was heard on Circuit by Judge Shipp, who reversed the findings of the master, and found that the deed set up in the pleadings was a mortgage, and ordered foreclosure. From this judgment the plaintiff appealed on twenty-two exceptions. These exceptions raise but two questions: (1) Was the deed a mortgage? (2) Is appellant entitled to rent?

*Mr. Wm. N. Graydon*, for the appellant, cites: *No presumption from possession being unchanged*: 34 S. C. 416; Code Civ. Proc. 126. *Proof necessary to show absolute conveyance a mortgage*: 3 Pom. Eq. Juris., sec. 1196; 3 Rich. Eq. 153; 52 S. C. 54; 41 S. C. 163; 45 S. C. 33; 54 S. C. 184; 55 S. C. 51; 66 S. C. 85; 61 S. C. 575; 88 S. C. 318; *Bass v. Bell*, 64 S. C. *Essentials of a mortgage*: 31 S. C. 276; 3 Pom. Eq. Juris. 1195.

*Mr. D. H. Hill*, for respondent, cites: *Burden of proof*: 54 S. C. 191; 70 S. C. 67; 41 S. C. 163; 52 S. C. 54; 6

Peters 629; 53 S. C. 19; 50 Am. Dec. 193. *Indicia of possession*: 20 Am. & Eng. Enc. of L. (2d ed.) 95; 12 Am. Rep. 671. *Essentials of mortgage*: 12 Am. Rep. 671; 1 Sug. Vendors (8 Am. Ed.) 302; 43 S. W. 437; 40 S. W. 101; 17 S. W. 323; 20 So. 614; 22 Pick. 526, 530; 4 Pick. 349; 14 *Ib.* 467, 478; 12 How. 139; 1 Sandf. Ch. 56; Story's Eq. 239, 245; Kerr, Fraud and Mistake, 186; 5 Binn. 99. *Presumption from unchanged possession*: *Cotterell v. Purchase*: Cad. Temp. Talbort 61; 4 DeGex & Jones 16; 7 Cranch 218; 2 Woodb. & Min. 426; 102 Ill. 442; 80 Am. Dec. 675; 18 N. W. 569; 20 So. 164; 53 S. C. 18; 42 Ill. 453; 45 Atl. 207; 19 So. 41; 77 Ill. 84. *Laches*: 58 N. E. 1053; 12 How. 154; 50 S. C. 174.

*Mr. Wm. P. Greene*, also for respondent, cites: *Action was for recovery of possession of land, and findings of fact are not reviewable*: 51 S. C. 560; 72 S. C. 287; 77 S. C. 414; 53 S. C. 45; 58 S. C. 1; 90 S. C. 320; 13 N. W. 743. *The Courts of law and equity had concurrent jurisdiction*: 3 Mich. 211; 34 Am. Dec. 211; 48 S. W. 999; 31 S. C. 141. *Indicia from possession, etc.*: 20 A. & E. Enc. of L. 938.

April 28, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER (after making the foregoing statement of issues):

The respondent raises a question as to the jurisdiction of this Court to pass on the facts, and claims that this is an action at law, and the findings of the Circuit Judge are not reviewable in this Court. This question must

1 first be determined. The plaintiff claims the right to possession under a deed from the defendant absolute on its face. The defendant admits the execution of the deed, but claims that, by virtue of a parol agreement, the deed is to be construed as a mortgage, and asks the Court to so find. The defendant does not deny the execu-



tion of the deed, or claim that it is a nullity for fraud or any other cause. He asks that his absolute deed be declared a mortgage. This is an equitable issue that must first be determined.

The recent case of *Williams v. McManus*, 90 S. C. 493, 73 S. E. 1038, says: "It is undoubtedly true that a deed which appears on its face to be an absolute conveyance may in equity be declared to be a mortgage, if the evidence be sufficient to show that such was the intention of the parties, yet it is equally true that the presumption is that the deed is, what on its face it purports to be, an absolute conveyance, and, to establish its character as a mortgage, the evidence must be clear, unequivocal, and convincing; for otherwise the natural presumption will prevail. 3 Pom. Eq. Jur., sec. 1196; *Arnold v. Mathison*, 3 Rich. Eq. 153; *Petty v. Petty*, 52 S. C. 54, 29 S. E. 406." The first issue in the case was: Was that deed intended as a mortgage? This raised an equitable issue first to be tried, and this Court has jurisdiction. When a Court sends a case at law to a master, is it the master or the Judge who represents the jury?

I. The first question is: Is the evidence "clear, unequivocal, and convincing" that this absolute deed was given as a mere security for a debt? We think not. The learned Judge who tried the case based his judgment, overruling the master, on three grounds:

(a) "The plaintiff said she had loaned the money and taken security." The plaintiff denied this. It is true the defendant had several witnesses to plaintiff's one. In a case of this sort, the appearance and conduct of the witnesses is an important consideration. The master saw them, and the Judge did not. The case shows several things that prevent the testimony of the many witnesses from producing conviction. They state things from which a mortgage is to be found, but do not use the word "mortgage." The most common word is "mortgage," and yet they all avoid it. They say that Mrs. Banks used these words time

and again. The witnesses were of the family of the defendant. There were disinterested witnesses at the time of the execution of the paper, and disinterested witnesses who talked with the parties afterwards, and not one of them heard of the transaction as a loan, security, or mortgage, or anything to indicate that an absolute conveyance was not intended. It is true defendant asked for a loan, and this is a circumstance that tends to show a mortgage; but is not conclusive, and it loses much, if not all, its force under the plaintiff's explanation. She said: "I did not want to do that, as I might need a home some day, and didn't think it would be wise in me to sell my land and lend out the money. He said if I would sell the land he would sell me a part of his land."

The old rule in a Court of Chancery was not to allow the conversion of land into money, in matters within its control, except upon great necessity. If the plaintiff was in bad health, it was wise for her to want a home and enough to save her from the necessity of living on charity. The defendant had raised her, and admits affection for her as if she were his daughter. The defendant was a widower with no legitimate child to provide for, and, whether wise or unwise, people who are getting old too frequently turn their property over to their children and afterwards repent. In his answer he claimed to have paid her interest and a part of the principal in sums too small for safe investment. There is a significant absence of these payments in his testimony. His wife testified: "I heard Mr. Frith say to Beulah on their return home from Abbeville: 'Now, Beulah, I have given you a deed to 100 acres of land for your \$500, so that, if anything should happen to me, you could not be knocked out of it.' " (Mr. and Mrs. Frith were married subsequent to the date of the deed.) What did that mean? The defendant had that day paid one mortgage and executed another. He knew the difference. He had given to his adopted daughter that day a deed. The intention that day

governs. The grantor that day said: "I have given you a deed \* \* \* so that if anything happens to me, you could not be knocked out."

The case does not show that Mrs. Banks was present at the execution of the deed, and nothing was said to them or to the friend at home about security. If the intention of the parties was to secure a debt, it is difficult to understand why an absolute deed was used to secure one debt and a mortgage given for the other. This is unexplained, and unexplained is fatal. We do not think the testimony is sufficiently "clear, unequivocal and convincing."

(b) "There was no change of possession or payment of rent." As both plaintiff and defendant lived on the premises, it is not clear what change of possession was requisite. The man on the premises would probably have managed the business, whatever the nature of the deed. As to payment of rent, the defendant cannot plead his own wrong or take advantage of her leniency. The proceeds of the place seem to have gone to the support of the family, and it was only natural that the man should have handled it and dealt with the tenants.

(c) "Tax return." It is also natural that the man should have made the return, and, if she trusted him to make the return, he certainly could not revoke his deed by making the returns in his own name. He paid the taxes, but he collected the rents, and it was his duty to pay the taxes.

1. Besides this, the grantor had the deed prepared, and the record does not show that the grantee was present. There is no suggestion in pleading or evidence of fraud or mistake. There is no reason suggested for the giving of an absolute deed, unless an absolute conveyance was intended.

2. The defendant had a plat made of 100 acres. Why make a plat when the conveyance was a mere security for a debt, which he expected to pay? Why should the mortgage cover 100 acres, instead of 195 acres? If the deed was a

mere security which the grantor expected to pay, and the grantor was not "cramped for money, and never had been," why not include the whole tract? The grantor had the plat made and made for Mrs. Banks.

3. The advertisement was dictated by Mrs. Banks, it is true, but it stated that 100 acres belonged to Mrs. Banks and 95 acres to Mr. Frith. It was taken down in writing and Mr. Frith was present. Mr. Percival, a disinterested witness, said: "Mr. Frith agreed to that, and said part belonged to him and part belonged to Mrs. Banks." The deed was in writing; the plat was in writing, and the advertisement was written. All the writings in the case give to Mrs. Banks the land, and not a mere security.

It puts it mildly to say the proof that the absolute deed was intended as a mortgage is not "clear, unequivocal and convincing."

II. The appellant did not prove that there was an agreement to pay rent by the preponderance of the evidence, and cannot recover rent.

The judgment of this Court is that the judgment appealed from is reversed, and the case is remanded to the Circuit Court, that proper proceedings may be had to lay off the line between the plaintiff and the defendant.

MR. CHIEF JUSTICE GARY concurs.

MR. JUSTICE HYDRICK, *concurring*. I concur in the finding that the deed was not intended as a mortgage; but I think plaintiff is entitled to recover the rental value of the land from the date of her demand for possession thereof. Having held that the land was hers, and that she was entitled to possession thereof, I do not see how the Court can deny her the right to recover the rental value thereof from the date of her demand for possession. No agreement to pay rent was necessary. The law imposes the payment of it as the proper measure of damages for unlawfully withhold-

ing the possession from her. She demanded possession in December, 1912, and I think she is entitled to recover the rental value of the land from that time.

MR. JUSTICE WATTS. I concur, but agree with Mr. Justice Hydrick that plaintiff is entitled to rent as indicated by him.

MR. JUSTICE GAGE, *dissenting*. I cannot agree with the majority.

First. The complaint stated a case at law for the recovery of specific real property. The answer denied plaintiff's assertion of title. That made a case at law, and for trial by a jury. Code of 1894, sec. 274. It is true the answer contained other allegations; but that is allowable. Code of 1894, sec. 171. The parties waive trial by jury, as they have a right to do. Code of 1894, sec. 288. The judgment of a Judge, substituted for that of a jury, may not be reviewed here, in a case like this. *Stack v. Haigler*, 90 S. C. 320, 73 S. E. 354.

Second. On the facts if reviewable, the judgment below is right. The justice of the case is with defendant. The land in issue was worth, at the making of the deed, \$2,500; there is no denial of that by anybody. The plaintiff demands it for \$500. The defendant was then an old man past 70 years of age, and unable to read or write. The plaintiff was young and somewhat literate. The land in issue is the seat of defendant's only residence, where he has lived for more than forty years. The defendant was pressed for money when the \$500 was advanced; the receipt of it and the execution of the deed was not spontaneous. The plaintiff never exercised acts of ownership and dominion, nor did she ever pay taxes on the land. The plaintiff admitted to three or four persons that the transaction was a loan and not a sale.

REP.]

November Term, 1918.

It is true defendant has married since the transaction; and it is also true the plaintiff has done likewise. It is true the defendant has done some things inconsistent with his present claim; but he has done more things consistent therewith.

The proof satisfies me that the transaction did not amount to a sale, but to a mortgage. That conclusion loses the plaintiff nothing; the contrary conclusion loses the defendant all.

I think the judgment below ought to be affirmed.

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8834

LYLES v. WILLIAMS.

(81 S. E. 659.)

RECEIVERS. APPOINTMENT.

Where defendant diverted collections made upon securities belonging jointly to himself and plaintiff and assigned as collateral, plaintiff's right to have a receiver appointed is not lost because defendant subsequently paid the debt from funds collected from other sources, for a diversion of trust property cannot be sanctioned although it is expected that other funds will supply its place.

Before PRINCE, J., Columbia, February, 1914. Reversed.

Action for a receivership to wind up a copartnership, brought by Wm. H. Lyles against T. C. Williams. From an order denying the appointment of a receiver, plaintiff appeals.

*Mr. D. W. Robinson*, for appellant, cites: *Right to appointment of receiver res judicata*: 92 S. C. 360; 65 S. C. 418. *Termination of partnership*: 168 U. S. 334; 21 Md. 30; 2 Paige Ch. 310; 90 S. C. 95. *Receivership in such matters a matter of course*: Collyer Partnership, sec. 375, pp. 583-4; Parson on Partnership, pp. 316-17; 2 Lindley Partnership, pp. 542-3; 72 Am. St. Rep. 81, note; 63 Am. Dec. 208-9; Beach Receivers, pp. 618-19; Kerr

Receivers, pp. 85-7; 71 Md. 82; 60 Pac. 155; 2 Md. Chan. 157; 21 Md. 30; 84 Pac. 871; 92 S. W. 266; 129 N. W. 842; 78 S. E. 902; 65 N. C. 162; 86 Ga. 162. *South Carolina law in such matters*: Code Civil Proc. 1912, sec. 303, s. d. 1; 80 S. C. 90-1; 89 S. C. 463; 53 S. C. 443; 83 S. C. 307-8. *Unnecessary to show insolvency*: 53 S. C. 443; 78 S. E. 902; 129 N. W. 842; 60 Pac. 155. *Answer not full*: 72 Am. St. Rep. 28.

*Messrs. Elliott & Herbert and E. L. Craig*, for respondent.

April 28, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

This is the second appeal. In the first appeal this Court remanded the case to the Circuit Court for Richland county, for the appointment of a receiver. 96 S. C. 290, 80 S. E. 470. The respondent claims that the judgment of this Court was based upon the facts as they then appeared; that they omitted important facts; and that respondent had the right to supply the omission in the Circuit Court and, having done so, the Circuit Court had the right to act upon the amended showing. The Circuit Court held that the respondent had made a sufficient showing, had supplied the omission, and again refused to appoint a receiver. The former judgment of this Court contained the following after citing an authority: "This case is not applicable here. This is not the property of a debtor as such, but the joint property of the plaintiff and defendant. The great power to dispose of the property without plaintiff's consent and the fact that the defendant has collected on assigned assets and applied the fund to other than the debt for which the assignment was made make a very different case. The judgment of this Court is that the order appealed from is reversed, the temporary restraining order revived, and leave is given to the plaintiff

to apply to any Circuit Judge having jurisdiction, for an order appointing a receiver."

The only matter that need be considered in the subsequent showing is that the respondent subsequently collected from other sources and paid on the debt, for which the securities were assigned as collateral, the amount of the collections. That which was alleged and not denied on the former appeal is now admitted. The Courts should not sanction the diversion of trust funds to other purposes with the hope or expectation, however well founded, that future collections will be made to supply its place. There was no material change in the showing. It was error not to have appointed a receiver, and the order refusing to appoint a receiver is reversed except as to the injunction, and the case is remanded to the Circuit Court for the appointment of a receiver and such further proceedings as may be necessary.

8836

POWELL v. CONTINENTAL INS. CO.

(81 S. E. 654.)

APPEAL AND ERROR. PLEADING. PRACTICE. DISCRETIONARY ORDER.  
FIRE INSURANCE. WAIVER.

1. Under Code Civil Procedure 1912, section 203, providing that, where an answer contains new matter constituting a defense by way of avoidance, the Court may, in its discretion, on defendant's motion, require a reply thereto, the matter of requiring a reply is within the trial Court's discretion, which will not be interfered with, in the absence of prejudicial abuse.
2. An agent with general authority, who is authorized to make contracts of insurance without consulting the company, may waive any

FOOTNOTE—The question whether the failure of the insurer to speak or act after notice of breach of policy constitutes a waiver thereof is treated in a note in 25 L. R. A. (N. S.) 1.

As to waiver of condition as to location of property, see note in 26 L. R. A. 242.



conditions of the policy, and his knowledge of material facts is the knowledge of the company.

3. The insurance company, upon learning that insured had violated the terms of his policy by removing the property from the place in which it was insured, should have offered to return the premium and cancel the policy, and its failure to do so is evidence tending to show a waiver of that condition.
4. Knowledge of the fire insurance agent within the scope of his agency that an insured had removed the insured property, contrary to the terms of the policy, was imputable to the principal.

Before RICE, J., Saluda, July, 1913. Affirmed.

Action by J. R. Powell on a fire insurance policy against Continental Insurance Company of the city of New York.

*Messrs. Clarkson & Clarkson*, for appellant, cite: *Reply to new matter in answer*: Code Civ. Proc. 203; 79 S. C. 271; 83 S. C. 264; 54 S. C. 601. *Judicial discretion*: 47 S. C. 498; 60 S. C. 135; 94 S. C. 16. *Charge on waiver was on facts*: 56 S. C. 531; 51 S. C. 460; 47 S. C. 513; 54 S. C. 603, 376; 51 S. C. 460; 47 S. C. 513; 56 S. C. 531. *Suspension not cancellation of risk*: 55 S. C. 6; 76 S. C. 76. *Stipulation in policy*: 68 S. C. 390. *Possession of policy and return of premium*: 55 S. C. 455; 68 S. C. 391. *Estoppel to assert forfeiture*: 88 S. C. 39; 75 S. C. 315; 70 S. C. 82; 52 S. C. 231; 78 S. C. 395. *Knowledge of agent affecting company*: 78 S. C. 395; 50 S. C. 290; 19 Cyc. 810. *Acts of agent as basis for waiver*: 68 S. C. 390; 78 S. C. 396.

*Messrs. Thurmond & Ramage*, for respondent, cite: *Knowledge and acts of agent*: 1 Code of Laws 2711, 2712; 16 A. & E. Enc. of L. (2d ed.) 908, 942; 1 May 70 A.; 1 Code of Laws 1810; 57 S. C. 358; 60 S. C. 486; 54 S. C. 599; 80 S. C. 292; 36 S. C. 213; 16 L. R. A. 33; 70 S. C. 82; 100 Am. St. Rep. 63; 80 S. C. 392; 19 Cyc. 781; 69 Am. St. Rep. 201; 76 Am. St. Rep. 111; 67 S. C. 399; 63

REP.]

November Term, 1918.

S. C. 297. *Waiver*: 56 S. C. 508; 61 S. C. 448; 143 U. S. 496; 51 S. C. 540; 55 S. C. 6; 57 S. C. 358; 51 S. C. 180; note 107 Am. St. Rep. 130. *Knowledge of agent imputed to principal*: 57 S. C. 16. *Burden of proof, evidence sufficient to go to jury*: 79 S. C. 295; 48 S. C. 195; 79 S. C. 526; 81 S. C. 152. *Policy only voidable*: 54 S. C. 599; 14 A. & E. Ann. Cases 89; 96 U. S. 577; 60 S. E. 470; 57 S. C. 358; 63 S. C. 192; 74 S. C. 246; 81 S. C. 152; 75 S. C. 315; 80 S. C. 392; 49 S. C. 454; 88 S. C. 37; 69 S. C. 445; 70 S. C. 183; 72 S. C. 556; 76 S. C. 432; 80 S. C. 531. *Charge on waiver*: 70 S. C. 82, 295; 57 S. C. 358; 107 Am. St. Rep. 130; 61 S. C. 292; 63 S. C. 219; 65 S. C. 326; 79 S. C. 97; 61 S. C. 388; 71 S. C. 95; 75 S. C. 150. *Waiver by adjustment agreement*: 57 S. C. 370; 55 S. C. 6; 67 S. C. 399; 78 S. C. 388. *Denial of liability waiver of proof of loss*: 29 S. C. 579; 36 S. C. 265; 70 S. C. 295. *Waiver of nonwaiver agreement*: 78 S. C. 433; 70 S. C. 16.

April 29, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This was an action brought to recover a money judgment on a fire insurance policy. The action was commenced on May 20, 1913. After answer was filed and issue joined, the defendant gave notice of motion that it would move to have the plaintiff reply to its answer. The cause was called for trial before Judge Rice on July 29, 1913, at Saluda, S. C.; this motion was then made and refused; and the case was tried and resulted in a verdict for the plaintiff for \$550. The defendant moved for a new trial on the minutes of the Court and upon the ground of after-discovered evidence, and the same was refused. After entry of judgment, defendant appeals.

The exceptions, eleven in number, may be divided into two classes. The first imputes error to the Circuit Judge in not requiring plaintiff to file a reply to the new matter

set out in defendant's answer. This exception is  
1 overruled, as section 203 of Code Civ. Proc. of  
S. C. 1912, says: "When the answer contains new  
matter constituting a counterclaim, the plaintiff may, within  
twenty days, reply to such new matter, \* \* \* and in other  
cases, where an answer contains new matter constituting a  
defense by way of avoidance, the Court may, in its discretion,  
on the defendant's motion, require a reply to such new matter;  
and in that case the reply shall be subject to the same rules as a  
reply to a counterclaim." This leaves the matter entirely within  
the discretion of the Judge, and we fail to see any erroneous exercise  
of discretion on his part whereby defendant was prejudiced. The second  
and third exceptions complain of error on the part of his Honor in  
his general charge to the jury. The fourth, fifth, sixth, seventh,  
eighth, and ninth exceptions charge error in charging, as requested,  
certain propositions of law for the plaintiff, and exceptions 10 and 11  
in refusing to charge requests of defendant. There is no exception as  
to the admissibility of any testimony, and there was no motion made  
for nonsuit or direction of verdict on the ground there was no evidence  
to support the alleged cause of action.

We will consider exceptions 2, 3, 4, 5, 6, 7, 8, and 9 together.  
The evidence in the case showed conclusively that Dr. Asbill was the  
agent of the defendant; that he issued the policy sued on. The  
plaintiff testified that he took out the policy with him, and received  
it from him. He himself verified the defendant's answer, and as a  
witness in the case testified he was the agent of the defendant at  
Ridge Spring. The statement of his Honor in the charge was not a  
charge on the facts and a violation of the Constitution. His charge  
was simply telling the jury that the question of waiver was for them,  
and tells them what evidence, if established to their satisfaction,  
might warrant them in inferring that the company had waived their  
right to cancel the policy.

"An agent with general authority, who is authorized to take risks and enter into contracts of insurance without consulting the company, may waive any of the conditions contained in the policy, and his knowledge of facts material to the risk is knowledge of the company." American & English Enc. of Law 942.

"An agent authorized to solicit insurance, to collect premiums, to countersign policies, and to accept service of papers for the company has the authority to waive the iron-safe clause in a fire insurance policy issued by a mutual insurance company to one of its members, although the charter and constitution provide such waiver can only be made by the president in writing." *Hankinson v. Insurance Co.*, 80 S. C. 392, 61 S. E. 905.

"When an insurance company has the right to cancel the policy, and fails to cancel it and return the unearned premium either before or after the fire, the jury may consider that as evidence of intention to waive the forfeiture." *Norris v. Insurance Co.*, 57 S. C. 358, 35 S. E. 572.

"Failure to cancel the policy and return the premium \* \* \* after such knowledge (of the breach) was a circumstance tending to show waiver of the right to insist upon the provision of the policy prohibiting other insurance." *Madden & Co. v. Insurance Co.*, 70 S. C. 295, 49 S. E. 855.

"Good faith would seem to require the insurer to cancel the policy and return the unearned premium, if before the fire, while the policy was current, it had notice that the insured had so violated the policy that under its terms he would recover nothing in case of loss." *Pearlstine v. Insurance Co.*, 70 S. C. 82, 49 S. E. 6.

"Forfeitures are not favored in the law; and Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or any agreement to do so on which the party has relied and acted." *Hartford*

*Ins. Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496.

When defendant discovered that plaintiff had violated the terms of his policy, it should have offered to return the premium and cancel the policy, and its failure to do so is a fact tending to show waiver. *Thompson v. Ins.*

3 *Co.*, 63 S. C. 297, 41 S. E. 464. There was evidence in the case that Asbill, the agent, knew of the removal by the insured of the insured property, and there is no dispute that he was the agent of the defendant, and it was properly submitted to the jury, under proper instructions, whether or not this was a circumstance sufficient within itself or a circumstance tending to show waiver. If he knew it, he should have notified plaintiff, so that plaintiff could have arranged that his property could be insured, at the place he had moved to, either with defendant or in some other company. A cancellation of the policy and a return of the unearned premium would have been sufficient notice to the plaintiff. If the agent of the company knew, and this was properly submitted to the jury, that the plaintiff, by his action in removing his property, had thereby forfeited his insurance, fair dealing and good conscience demanded that he be informed of the consequences; it would not be right for the company, with the knowledge of this fact, to retain his premium and allow him to be lulled into a state of security thinking he had a good policy of insurance, whereas he had forfeited it, and after loss refuse to pay, thus inflicting loss and damage to him with his unearned premium, not returned before loss, but retained by them.

"The agent and applicant are not upon equal terms of knowledge. The applicant is generally ignorant of the powers of the agent and the special rules by which the solicited contract is to be controlled. The agent is generally expert in these matters, and common honesty and fairness demand that the applicant be not misled, to his injury, by

the agents in one kind of an association as well as the other, whether the subject matter of waiver and estoppel relate to the form or the substance of the contract." *McCarty v. Insurance Co.*, 81 S. C. 152, 62 S. E. 1, 18 L. R. A. (N. S.) 729.

In this case there was evidence that the agent acquired knowledge within the scope of his agency that the plaintiff had removed the insured property, and made no objection;

this knowledge of the agent is imputable to his prin-

4 cipal. We see no error on the part of the Circuit

Judge as imputed to him by these exceptions, and they are overruled. As to the tenth and eleventh exceptions, these exceptions virtually amounted to a request on the part of the defendant for the direction of a verdict on the ground there was no evidence to sustain a verdict for the plaintiff. There was sufficient evidence for the jury to determine the issues submitted to them, and we do not find in any of the exceptions any prejudicial statement of the Judge in his charge that would warrant this Court in sustaining any of them and in granting a reversal and new trial. All exceptions are overruled.

Affirmed.

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8840

EAKER v. FLOYD.

(81 S. E. 656.)

APPEAL AND ERROR. ORDERS APPEALABLE. GRANTING NEW TRIAL IN MAGISTRATE'S COURT.

An order of the Circuit Court granting a new trial in a case removed into that Court by appeal from a magistrate's Court is not appealable, where it does not appear that the decision was influenced by any error of law, and that the Supreme Court could render judgment absolute if it should determine that no error was committed in granting the new trial.

Before FRANK B. GARY, J., Spartanburg, December, 1912.

Appeal from order of Circuit Court made on appeal from a magistrate's Court, in action brought by G. W. Eaker against W. M. Floyd. The Circuit Court granted a new trial before another magistrate.

*Mr. J. C. Otts*, for appellant, cites: *The magistrate before whom the new trial was ordered was not the magistrate before whom the trial should be had, not being the next nearest magistrate to the original magistrate, qualified to try the case*: Const., V 23; Code Civil Proc., sec. 23; 25 Stats. 1149; 26 Stats. 114 to 118; 1 Code of Laws, sec. 1465; 1 Suthl. Statutory Construction 465. *Affidavit on which motion to change venue was based insufficient*: 67 S. C. 245; 2 Code Civil Proc. 19; Const., VI 20.

*Mr. C. C. Wyche*, for respondent.

May 6, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

This is an appeal from an order of the Circuit Court granting a new trial in a case removed into that Court by appeal from a magistrate's Court. It does not appear that the decision was influenced by any error of law, or that this Court could render judgment absolute upon the right of the appellant, if it should determine that no error was committed in granting the new trial. The order is, therefore, not appealable. *Daughty v. Railroad Co.*, 92 S. C. 361, 75 S. E. 553; *Kirkland v. Railway*, 93 S. C. 574, 77 S. E. 709; *Miller v. Railroad Co.*, 95 S. C. 471, 79 S. E. 645.

Appeal dismissed.

MR. JUSTICE GAGE did not sit in this case.

REP.]

November Term, 1918.

8841

CAMPBELL v. GREENVILLE, S. &amp; A. RY.

ROGERS v. SAME.

(81 S. E. 676.)

RAILROADS. CROSSING ACCIDENTS. SIGNALS.

Notwithstanding that the charter of an interurban electric railway company, granted under the general law, provided that it should be subject to all of the liabilities of railroad corporations embraced in the general railroad law (Civil Code 1912, secs. 3098-3316), section 3222, requiring the ringing of a bell or blowing of a whistle 500 yards from a public highway crossing, and that the bell be kept ringing until the engine crossed the highway, would not be applicable to electric railroads.

Before BOWMAN, J., Anderson, Fall term, 1913. Reversed.

Actions by E. V. Campbell and Jones J. Rogers against Greenville, Spartanburg & Anderson Railway Company, to recover damages to a horse, the property of Rogers, and buggy, the property of Campbell, in a collision with a car being operated by defendant at a public crossing. From a judgment for the plaintiff in each case, defendant appeals.

*Messrs. Bonham, Watkins & Allen*, for appellant: *The statute, 1 Code of Laws 1912, sec. 2123, does not apply to railroads operated by electricity. As to construction of statutes: 56 S. C. 173; 68 S. C. 411; 28 S. C. 521. Charge on facts: 31 S. C. 218; 38 S. C. 31.*

*Messrs. Greene & Earle*, for respondent, cite: *Electric railroads within general railroad law: 63 L. R. A. 637; 13 Am. Neg. Rep. 663; 3 Am. Neg. Rep. 125; 81 Mo. App. 78; 67 L. R. A. 64, note.*

May 6, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.



The plaintiff in each of these cases recovered judgment against the defendant for damages resulting to his property by collision with one of the cars of the defendant at a public crossing.

The defendant operates its cars by electricity by means of overhead trolleys. Its charter, granted by the Secretary of State under the general law, provides that it "shall be entitled to all the rights, power and privileges, and be subject to all the limitations and liabilities of railroad corporations embraced in the general railroad law, being chapter 50 of the said Code of 1902 (chapter 69 of Code of 1912), as well as any acts now existing or hereafter to be passed, regulating the duties, privileges and liabilities of railroad companies."

The Court instructed the jury that this provision of its charter imposed upon defendant the duty prescribed by the general railroad law of ringing a bell or blowing a whistle 500 yards from the place where the railroad crosses any public highway, and of keeping the bell ringing or the whistle sounding until the engine has crossed such highway.

In this instruction, there was error. The statute shows by its terms that it was not intended to apply to railroads operated by electricity, but only to those operated by steam. Other portions of the charge to which exception has been taken are dependent upon this erroneous application of the statute, and need not be specially considered.

Judgment reversed.

MESSRS. JUSTICES FRASER and GAGE concur in result only.

REP.]

November Term, 1918.

8843

## BETHEA v. WESTERN UNION TEL. CO.

(81 S. E. 675.)

TELEGRAPH COMPANIES. NONDELIVERY OF MESSAGE. PUNITIVE DAMAGES.  
CHARGE. VERDICT.

1. A verdict which finds for plaintiff for punitive damages only contains an implied finding of nominal actual damages, and is sufficient; there being evidence to sustain a finding for at least nominal damages.
2. The Court instructed, in an action for damages for nondelivery of a telegram, that the form of the verdict should be, either that the jury find for plaintiff for so many dollars actual damages, which includes mental anguish, etc., and so many dollars punitive damages, if they also found punitive damages, or that the jury found for defendants, and that, if the jury found both actual and punitive damages, they should keep them separated. *Held*, that the instruction was to the effect that the verdict should indicate the kind of damages to which plaintiff was entitled, and was proper.
3. A verdict for punitive damages only is improper, if there was no evidence tending to show at least nominal actual damage.
4. The fact that the verdict did not contain an express finding for plaintiff for actual damages, but merely awarded a certain sum as "punitive damages," was a mere irregularity, where there was evidence of actual damage, which was waived by appellant's failure to object thereto until the jury were separated, since he should have objected to the form of the verdict as soon as it was read.

Before FRANK B. GARY, J., Bennettsville, November 1913. Appeal dismissed.

Action by Lawrence Bethea against Western Union Telegraph Company. From judgment for plaintiff, defendant appeals. The facts are stated in the opinion.

*Messrs. Stevenson & Prince* and *Geo. H. Fearons*, for appellant, cites: *As to punitive damages*: 77 S. C. 56; 48 S. C. 321.

*Mr. J. K. Owens*, for respondent, cites: 77 S. C. 56; 60 S. C. 67; 70 S. C. 418; 86 S. C. 247; 90 S. C. 541.

FOOTNOTE—As to the damages recoverable in action by addressee of telegram for delay in delivery, see note in 30 L. R. A. (N. S.) 1183.

May 6, 1914.

The opinion of the Court was delivered by Mr. CHIEF JUSTICE GARY.

On the 19th of May, 1912, G. F. Bethea, a brother of Lawrence Bethea, delivered to the defendant the following telegram, addressed to the plaintiff at Dillon, S. C.: "Come at once if you want to see brother living."

The jury rendered the following verdict: "We find for the plaintiff two hundred and fifty dollars punitive damages."

The defendant appealed upon the following exception: "The Court erred in refusing to set aside the verdict and order a new trial, when, from the finding taken in connection with the charge of the Judge, it appeared that there had been no actual damages inflicted, and hence punishment was visited on the defendant for a wrong which had not been committed, and which the jury by its findings negatived."

His Honor, the presiding Judge, charged the jury as follows in regard to the form of their verdict:

"The form of your verdict will be either, 'We find for the plaintiff' so many dollars actual damages, and that includes, of course, mental anguish, intense mental suffering, and so many dollars punitive damages, if you also find punitive damages, or, 'We find for the defendant.' In other words, gentlemen, if you find both actual and punitive damages, I want you to keep them separated. Now if, in your deliberations, you have any confusion about the form of the verdict, or the law, or anything else, don't hesitate to let it be known. If I can be of any service to you, I will be glad to do so. Is there anything further for the plaintiff?"

"Mr. Owens: It occurs to me, possibly, that the complaint stands as one solid demand; that there would be no use in the jury specifying as to damages; that the jury could find for the plaintiff without specifying what they find as actual damages, and what they find as punitive damages.

"The Court: They might do it; but I am not going to permit them to do it. If you find that, as the result of the negligence and wanton conduct of the defendant, he has suffered mental anguish, you have a right to award actual damages and also punitive damages, and I want you to keep them separate. You could find a bulk sum; but I don't want them kept that way. If you find for the defendant, you will simply say, 'We find for the defendant.'"

In the case of *Doster v. Telegraph Co.*, 77 S. C. 56, 57 S. E. 671, the Court had under consideration the question whether a verdict for punitive damages only could be sustained. Mr. Justice Woods, who delivered the opinion of the Court, thought that the verdict should be set aside; but the other members of the Court thought otherwise, and in stating their views he used the following language: "In their view the verdict is responsive to the cause of action based upon allegations of injury as the result of wilful breach of duty, in which the jury had power to award damages, and characterize them punitive. They think, further, the verdict does not negative the idea that there was some actual injury, however slight, but negatives the idea that the injury was done negligently and inadvertently, and declares that it was done wilfully, hence the character of the damages awarded could be punitive, instead of strictly compensatory, and that the jury may also have thought that the actual injury was not so substantial as to require expression in their verdict. The majority further think, inasmuch as it has been held that there was evidence sufficient to require that the matter of punitive damages should be submitted to the jury, the verdict upon such issue involves a finding of whatever is legally essential as a basis for punitive damages."

Under this authority, we do not regard the charge of his Honor, the presiding Judge, and the verdict of the jury as inconsistent. A verdict which shows upon its face that it

is a finding for punitive damages only is, in effect, 1, 2 dual in its nature. It is not only a finding for punitive damages, but also for actual damages, that are merely nominal, and therefore "not so substantial as to require expression in their verdict." There is nothing in the charge to indicate that the Circuit Judge intended to change the rule announced in *Doster v. Telegraph Co.*, 77 S. C. 56, 57 S. E. 671.

The plain object of the charge was that the verdict of the jury should indicate the kind of damages to which the plaintiff was entitled, if they found in his favor; and, as we have just stated, the verdict shows this fact.

There was testimony that the plaintiff sustained at least some actual damages. He expended 25 cents for the transmission of the telegram, and 15 cents for its delivery to him by a third party to whom it was handed by the defendant. He also suffered inconvenience by reason of the delay in the delivery of the telegram, as he was compelled to make the trip on a bicycle, and did not arrive at Dillon until about 8 o'clock, which was too late to see his brother before he died.

If there had not been testimony tending to prove some actual damages, even though nominal, the verdict 3 for punitive damages alone would not have been proper.

There is another reason why the appeal should be dismissed. The alleged irregularity did not involve the merits, but merely pertained to the rules of procedure. In such cases the irregularity must be called to the attention 4 of the Court at the earliest opportunity; otherwise it will be deemed to have been waived. *State v. Norton*, 69 S. C. 454, 48 S. E. 464; *Sumter v. Hogan*, 80 S. E. 497. That was not done in this case. The appellant, instead of making its objection to the form of the verdict

as soon as it was read, waited until the jury separated and then urged the alleged irregularity as a ground for a new trial. This was too late.

Appeal dismissed.

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8844

GERMOFERT MFG. CO. v. CASTLES.

(81 S. E. 665.)

PLEADINGS. SHAM ANSWER. PRACTICE.

1. If a pleading is manifestly false and interposed to defeat or delay plaintiff's action, the Court will strike it as sham, the word "sham" being synonymous with "false" and applicable to designate all the pleadings which are in fact false, whether good or bad in substance, but a pleading is not sham merely because it is legally insufficient or because it contains inconsistent averments or omits material facts, etc.
2. A motion to strike a pleading as sham can only be directed against an entire answer or defense, and an entire answer will not be stricken upon a showing that a separable part of it is sham.
3. A motion to strike a pleading or defense as sham is not regarded favorably, and will only be granted where the falsity of the pleading clearly appears; its truth or falsity ordinarily being for the jury.
4. In an action on a promissory note given for fertilizer which stipulated that the maker would in nowise hold the payee responsible for the practical results of the fertilizer on crops, it was error to strike as sham a counterclaim alleging that plaintiff represented that the fertilizer was adapted to promote growth of cotton and defendant purchased it relying on such representation, but that it in fact damaged his cotton crop; the counterclaim being proper.
5. An allegation is irrelevant, where the issue made by its denial has no effect upon the cause of action or no connection with the allegation, and, in an action on a note given for fertilizer which provided that the payee should not be held responsible for the results of the fertilizer on the crops, allegations of a counterclaim that defendant purchased the fertilizer on plaintiff's representations that it was adapted to cotton, but that it in fact damaged defendant's cotton, were not irrelevant.
6. Where an entire pleading or part of a pleading setting up a defense consists of irrelevant matter, a general demurrer will lie to it, but

it may not be stricken on motion under a statute limiting motions to strike to irrelevant matter contained or inserted in a pleading otherwise good.

Before GAGE, J., Winnsboro, January, 1914. Reversed.

Action by the Germofert Manufacturing Company against S. F. Castles to recover the purchase money for fertilizers sold. From an order granting a motion to strike out a counterclaim in answer as sham, defendant appeals.

The second, third, fourth and fifth paragraphs of the counterclaim struck out alleged:

"2. That prior to the first day of May, 1908, the plaintiff, through its agents and servants, represented to this defendant that it was the manufacturer of a high and valuable grade of commercial fertilizer, which was especially adapted to promote the growth of cotton or other crops that might be planted by the defendant, and upon the representations so made by the plaintiff as to the quality and grade of said fertilizer, this defendant purchased from the plaintiff one hundred bags or sacks thereof to be used by him in the cultivation of his crop of cotton on his plantation situate in the county of Fairfield, in the State aforesaid; and said purchase was made and note given therefor in the sum of two hundred and thirty-nine dollars wholly and solely upon the said representations so made by the plaintiff.

3. That during the year 1908 the defendant planted and cultivated one hundred acres in cotton of his said plantation, and applied thereto the said fertilizer so purchased, as aforesaid, from the plaintiff, according to the instructions and directions given to him, but the said fertilizer so applied to said crop, instead of stimulating and promoting the growth of said cotton, as the plaintiff had represented it would do, as a matter of fact killed and damaged his crop to such an extent that he had to plant over his whole crop, and, in addition, had to replant the same twice thereafter.

all of which was caused by the said fertilizer killing said cotton, the total crop being killed and damaged to the extent of at least fifty per cent. thereof, of all of which said results the plaintiff was duly notified.

4. That the said cotton crop of defendant was planted upon some of his best land, was cultivated under favorable conditions, and notwithstanding the fact that the defendant had been accustomed to gather from fifty to sixty-five bales therefrom, he only gathered during the year 1908 twenty bales of cotton from said one hundred acres, all of which loss and damage was due wholly and entirely to the damaging effects of the fertilizer so sold and delivered to this defendant by the plaintiff, as aforesaid, and as a proximate cause thereof.

5. That, by reason of the actual damage done to plaintiff's crop of cotton and the loss in yield thereof due to said fertilizer killing the same, and the extra labor and expense, which was necessarily incurred by this defendant and in planting and replanting the said crop, this defendant has been damaged in the sum of two thousand dollars."

*Messrs. McDonald & McDonald*, for appellant, cite: *Essentials of counterclaim*: Code Civil Proc. 200; Pom. Code Rem. 849, *et seq.*; 77 S. C. 493; 6 Am. & Eng. Enc. of L. 789; 1 Addison Contracts 446.

*Messrs. Nathans & Sinkler*, for respondent.

May 6, 1914.

The opinion of the Court was delivered by Mr. CHIEF JUSTICE GARY.

This is an action on a promissory note, of which the following is a copy: "\$239.00. Rockton, S. C., May 1st, 1908. On or before the 1st day of November, 1908, I promise to pay Germofert Manufacturing Company, or order, at Bank of Fairfield, Winnsboro, S. C., two hundred thirty-nine and



no-100 dollars, with interest at eight per cent. per annum, after maturity, until paid and all costs of collection, including attorney's fees not exceeding ten per cent., if collected by law or through an attorney at law. (100) bags of fertilizer ——. Sold to me by said payees. It is expressly understood and covenanted, that the said Germofert Manufacturing Company, sells said commercial manure as to its quality and effect on crops only on the guaranteed analysis; and I admit that every sack is branded according to law, and that the inspector's tag is on every sack for which this note is given. And I in no wise hold payee responsible for practical results of said fertilizer on crops. And in consideration of the above, I accept said fertilizer on these terms, and each of us, whether principal, security guarantor, indorset or other party hereto, hereby severally waives and renounces, each for himself, demand, protest and notice of demand, protest and nonpayment. (Signed) S. F. Castles."

A note similar to this was construed in the case of *So. Phos. Co. v. Arthurs*, ante, 81 S. E. 663, in which the opinion has just been filed. The defendant answered, setting up several defenses, whereupon the plaintiff's attorneys gave notice that they would make a motion to strike out certain allegations of the defenses, on the ground that they were sham and irrelevant. Some of the allegations were struck out, while the motion was refused as to others. Among the allegations which the plaintiff made a motion to strike out, were all of paragraphs 2, 3, 4, and 5 of the counterclaim, and the sole question raised by the exceptions is whether there was error on the part of his Honor, the Circuit Judge, in ordering that "the allegations of the counterclaim must be stricken out."

The first question we will consider is whether the allegations of the counterclaim were sham. Section 210 of the Code, 1912, provides that "sham and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the Court in its discretion may impose."

"The objection to sham defenses ordinarily presents a question of fact for the Court, to be determined on affidavits, or in such manner as the Court may direct. If the pleading is manifestly false, and interposed to delay or

1 defeat the plaintiff's action, the Court will strike it out. This power should be sparingly used, and only in cases free from doubt." *Tharin v. Seabrook*, 6 S. C. 113; *Ransom v. Anderson*, 9 S. C. 438; *Standard Co. v. Henry*, 43 S. C. 17, 20 S. E. 790. The word "sham" is synonymous with "false" and applicable to all pleadings which fall within its terms, whether good or bad in substance. 20 Enc. Pl. & Pr., p. 13. "A sham pleading is one good in form but false in fact. \* \* \* A pleading is not a sham, merely because legally insufficient, or demurrable for insufficiency, nor because insufficiently setting forth a valid claim or defense, nor because of the omission of material facts, nor because it contains inconsistent averments." 31 Cyc. 623, 624.

"The motion to strike out a pleading as sham can be directed only against an entire answer, or an entire defense, and an entire answer will not be stricken out, upon a showing that a separable part of it is sham. \* \* \* The

2, 3 motion to strike out a pleading or defense as sham . is not looked upon with favor, and will be granted only, where the falsity clearly appears, since the truth or falsity of a pleading is ordinarily to be tried by a jury, with full opportunity for producing, examining and cross-examining witnesses." *Id.* 628; *Buist v. Salvo*, 44 S. C. 143, 21 S. E. 615; *Pierson v. Green*, 69 S. C. 559, 48 S. E. 624.

Furthermore, the case of *Kirven v. Chemical Co.*, 77 S. C. 493, 58 S. E. 424 (in which the judgment was sustained by the United States Supreme Court, 215 U. S. 252.

30 Sup. Ct. 78, 54 L. Ed. 179), shows that the

4 subject matter of the defense was such as could be properly interposed as a counterclaim in a case like

this, and also that the defendant had the right to bring a separate action on the facts therein alleged.

There was error, therefore, on the part of his Honor, the presiding Judge, in ruling that the allegations setting up the counterclaim should be stricken out on the ground that they were sham.

5 The next question for consideration is whether the allegations of the counterclaim were irrelevant.

"An allegation is irrelevant, when the issue formed by its denial can have no connection with, nor effect upon, the cause of action." Pom. Code Rem., sec. 551. This language is quoted with approval in *Smith v. Smith*, 50 S. C. 54, 27 S. E. 545, and numerous other cases. It cannot be successfully contended that the allegations of the defense which the plaintiffs made a motion to strike out have no connection with, nor effect upon, the plaintiff's cause of action.

There is still another reason why the counterclaim should not be struck out: "A demurrer is not generally a proper remedy for disposing of irrelevant or redundant matter contained in a pleading, but an application to strike out

6 is the only proper remedy, since a demurrer does not lie to a part only of the allegations intended to set forth a single cause of action or defense; nor is irrelevancy, redundancy, or surplusage a ground of demurrer to the pleading as a whole. On the other hand, where an entire pleading, or part of a pleading, purporting to set up a separate cause of action or defense, is wholly devoid of merit, and consists only of irrelevant or superfluous matter, a general demurrer will lie, or the objection may be taken in some other manner proper for determining its sufficiency; but according to many authorities it may not be stricken out under a Code provision the language of which limits motions to strike out to irrelevant or redundant matter contained or inserted in a pleading which is otherwise good." 21 Ency. P. & P. 234-236. This language was quoted with

REP.]

November Term, 1918.

approval in *Tittle v. Kennedy*, 71 S. C. 1, 50 S. E. 544, 4 Ann. Cas. 68.

The question whether the allegations of the counterclaim were sufficient to constitute a defense, were, therefore, not properly before the Court for consideration.

Order reversed.

MR. JUSTICE GAGE did not sit in this case.

8845

GERMOFERT MFG. CO. v. DELLENEY.

(81 S. E. 667.)

PLEADINGS. SHAM.

Defense of fraud in action for purchase money of fertilizers sold, held to be improperly stricken out as sham under *Germofert Fertilizer Co. v. Castles*, *supra*.

Before GAGE, J., Winnsboro, January, 1914. Reversed.

Action by Germofert Fertilizer Company against T. E. Delleney for recovery of purchase price of fertilizers sold. From an order striking out defense of fraud in answer, the defendant appeals.

*Messrs. Hanahan & Taylor*, for appellant.

*Messrs. Nathans & Sinkler*, for respondent.

May 6, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This case is controlled by the principles announced in the cases of *Germofert Mfg. Co. v. S. F. Castles*, 81 S. E. 665, and *Germofert Mfg. Co. v. A. Lee Scruggs*, *infra*, in which the opinions have just been filed.

Order reversed.

8846

## GERMOFERT FERTILIZER CO. v. SCRUGGS.

(81 S. E. 667.)

PLEADINGS. SHAM.

Counterclaim in action for purchase money of fertilizers sold, *held* to be improperly stricken out as sham under *Germofert Fert. Co. v. Castles, supra*.

Before GAGE, J., Winnsboro, January, 1914. Reversed.

Action by Germofert Fertilizer Company against A. Lee Scruggs to recover purchase price for fertilizers sold. From an order striking out counterclaim in answer as sham, defendant appeals.

*Mr. Geo. W. Ragsdale*, for appellant, cites: *General denials*: 9 S. C. 439. *Allegations of fraud*: 61 S. C. 190; 62 S. C. 42; 78 S. C. 482; 50 S. C. 397; 80 S. C. 298; 58 S. C. 56; 26 S. C. 275; 2 Hill L. 657; Bliss Code Pldg. 211; 95 S. C. 390; Crim. Code, sec. 507. *Counterclaim*: Code Civil Proc. 200; 11 S. C. 337; *Simpkins v. R. R. Co.*, 20 S. C. 258; 71 S. C. 404; 43 S. C. 63; 34 Cyc. 703, 706. *Failure of consideration*: 40 S. C. 31; 80 S. C. 297; 85 S. C. 492; 77 Cyc. 493. *Fraud*: 70 S. C. 115; 2 Rich. L. 154; 20 S. C. 503; 64 S. C. 69; 68 S. C. 106; 71 S. C. 150. *Frivolous pleading*: 27 S. C. 164.

*Messrs. Nathans & Sinkler*, for respondent, cite: *Essentials in alleging fraud*: 31 Iowa 344. *Contract in writing clear and unambiguous, parol testimony inadmissible to prove allegations*: Wald's Pollock, Contracts 457; 69 S. C. 99; 1 Greenleaf Ev. 227, 275; 27 S. C. 380; 83 S. C. 205; 74 S. C. 576; Pom. Code Rem. 641.

May 6, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

The facts in this case are similar to those in the case of *Germofert Mfg. Co. v. S. F. Castles*, 81 S. E. 665, in which the opinion has just been filed. In that case, the motion to strike out certain allegations in the defenses set up in the answer was made upon the ground that said allegations were sham and irrelevant, while the motion in the present case was based upon the ground that similar allegations were irrelevant and redundant.

There is no difference in principle between the two cases. Order reversed.

MR. JUSTICE GAGE did not sit in this case.

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8848

## KENDRICK v. MOSELEY.

(81 S. E. 652.)

## CHATTEL MORTGAGES. PRIORITY. MORTGAGES. RIGHTS OF CROP MORTGAGEE.

Where the mortgagor, after giving a crop mortgage for the next season, surrendered possession to the real property mortgagee without having planted crops, and the proceeds of the crop raised by the mortgagee together with the proceeds of the land upon foreclosure did not satisfy the real property mortgage, the crop mortgagee has no rights.

Before PRINCE, J., Spartanburg, June, 1913. Reversed.

Action by O. S. Kendrick against M. A. Moseley. From a judgment for plaintiff, defendant appeals. The facts are stated in the opinion of the Court.

*Mr. J. C. Otts*, for appellant, cites: *Mortgagee in possession*: 62 S. C. 300; 67 S. C. 432; 162 U. S. 416; 37 S. C. 562; 20 S. C. 17; 3 Pom. Eq. Juris. 1189; 53 N. Y. 225; 86 N. E. 463; 37 S. C. 562; 20 S. C. 17; 15 Atl. 255. *Chattel interest subordinate to title to land*: 24 Am. Dec. 105.

*Title to land in mortgagee:* 62 S. C. 300; 18 So. 105; 63 Am. Dec. 151; 3 Pom. Eq. Juris. 1190, 1213-1219, 2432.

*Messrs. Butler & Hall*, for the respondent, cite: *Chattel mortgage of future crops good:* 14 S. C. 112; 27 S. C. 44; 43 S. C. 39; 45 S. C. 133; 10 S. C. 452; 5 S. C. 280; 1 Code of Laws 4106. *Distinguishes:* 18 So. 105. *Mortgagee in possession of lands:* V Stats. 169, 311; XVII Stats. 19; 26 S. C. 401; 36 S. C. 428; 10 S. C. 354; 12 S. C. 9.

May 7, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

Eugene Bates, being the owner of a tract of land, gave four mortgages on it. The last three, executed in 1908, 1910, and 1911, respectively, were owned by the defendant, Moseley. On January 22, 1912, Bates gave the plaintiff a mortgage on the crops to be grown on the land that year. The crop mortgage and those on the land were all duly recorded. Bates planted no crops; but, in February, 1912, he left the State, and Moseley took possession of the land, with his consent. Moseley cultivated the land, and raised and gathered certain crops on it. In the meantime, he commenced an action to foreclose his mortgages, and in November, 1912, the land was sold under the decree of foreclosure, and Moseley became the purchaser. The proceeds of the crops and the proceeds of the sale of the land, after payment of the costs of the action and the first mortgage thereon, were insufficient to pay the amount due on Moseley's mortgages. Plaintiff brought this action to require Moseley to account to him for the value of the crops raised on the land, and to have the same applied to the payment of his mortgage debt. The sole question is whether Moseley is so liable to the plaintiff.

He who takes a mortgage on property not then in existence takes it subject to the contingency that the property described in the mortgage will be brought into existence, or

acquired by the mortgagor, or by some one under the mortgagor, under such circumstances that the mortgagor will be the legal or equitable owner of it, or some part or interest in it. For certainly no one can mortgage property which he does not own, actually or potentially, and to which he never acquires any title, legal or equitable. The case is analogous to that of the assigning of wages to be earned in future. If the assignor fails to earn any wages, the assignee takes nothing. Such a mortgage or assignment covers a mere possibility, and he who takes it as security does so in reliance upon the honesty and ability of his debtor to bring into existence the thing mortgaged or assigned.

So, in this case, Kendrick took his mortgage subject to the contingency that Bates would raise the crops, or that some one would do so for him, or under him, under circumstances in which Bates would have title, legal or equitable, to them. Suppose neither Bates nor Moseley had raised any crops on the land, there would have been nothing to which the lien of Kendrick's mortgage could have attached. Bates raised none, nor did he have any title, legal or equitable, to the crops themselves which were raised by Moseley. Therefore there was nothing to which the lien of Kendrick's mortgage could have attached.

It cannot be contended that Bates was the owner of the crops raised by Moseley, or that he had any title, legal or equitable, to them, or to any part of them, which would have enabled him to recover them, or the value of them, from Moseley. Certainly he could not have given Kendrick any higher rights than he himself would have had. His right against Moseley was that of a mortgagor against his mortgagee in possession of the mortgaged premises, and that right is to require the mortgagee to account for rents received, or a reasonable rental value, where he uses and occupies the premises himself. But the mortgagor has no title, legal or equitable, to the crops raised by his mortgagee in possession, or by those under him. Indeed, it would be



unjust to the mortgagor to make his compensation for the use and occupancy of his land depend upon whether the farming operations of his mortgagee in possession were successful or unsuccessful. Therefore the measure of such a mortgagee's liability is made more certain, by requiring him to account to the mortgagor for reasonable rents or a reasonable rental value. *Givens v. Carroll*, 40 S. C. 413, 18 S. E. 1030, 42 Am. St. Rep. 889; 2 Jones on Mort., sec. 1122. And that is the measure of Moseley's liability to Bates. But Kendrick's mortgage does not cover the rents or the rental value of the land.

Aside from this, Moseley, having been put into possession under prior recorded mortgages of the land, had the right to apply the rents, or the rental value thereof, to the satisfaction of his mortgages, in the absence of any assignment thereof by the mortgagor prior to his possession. This right is not affected by the fact that his mortgages do not cover the crops to be raised on the land; or the rents of the land. It grows out of the fact that he was a mortgagee in possession.

Section 4106, vol. I, Code of Laws, 1912, has no bearing on the question at issue, for it is not necessary to decide whether Kendrick's mortgage would, after condition broken, have vested in him a legal or an equitable title to any crops which might have belonged to Bates, since, under the facts stated, it vested no sort of title in him to the crops raised by Moseley.

For these reasons, the judgment is reversed and the complaint dismissed.

MR. JUSTICE FRASER concurs in the opinion of MR. JUSTICE HYDRICK. MR. CHIEF JUSTICE GARY concurs in the result.

MR. JUSTICE GAGE, *dissenting*. The plaintiff sued the defendant for the proceeds of seven bales of cotton grown and gathered by the defendant upon a small parcel of land in 1912. The plaintiff's right is rested upon a chattel mort-

gage of the cotton, made in January, 1912, by the then owner, Bates, to secure a loan of \$150, then made by Kendrick to Bates, for purposes not disclosed by the testimony. The answer is a general denial. Bates was overwhelmed with debt; he had made four mortgages on his small farm, three of which Moseley owned; and in February, 1912, he put Moseley in charge of his land and departed. There was nothing else for him to do. Moseley cultivated the lands that year and thereon grew the seven bales of cotton in dispute. In the fall of 1912 the mortgages were foreclosed; and the price thereof, with the price of the seven bales of cotton, did not satisfy the four mortgage debts. The plaintiff claimed the proceeds of the seven bales of cotton by virtue of his chattel mortgage thereon. The defendant claimed the proceeds of the seven bales of cotton by virtue of his position with reference to the land, to wit, a mortgage creditor in possession thereof. The master reported in favor of the plaintiff. The report was confirmed in a formal order. The defendant appeals.

There are nine exceptions, all charging errors of law, but there are not nearly so many real issues made. The prime contention of the defendant is based upon the doctrine, well established, and announced in *Sims v. Steadman*, 62 S. C. 304, 40 S. E. 677; and that is, when a mortgage creditor comes rightfully in possession of the mortgaged premises, neither the mortgagor nor one who claims under him may put the creditor out of possession, but may only redeem. The whole argument of appellant's counsel is made to sustain that contention, and no more. Of course, the doctrine contended for is sound, but it is not germane to the facts of this case. The plaintiff does not seek to oust the defendant from mortgaged land. The plaintiff is not, and has never been, the owner of the land. The plaintiff is not after the land or the proceeds of sale thereof.

The position of the parties is this: Kendrick got a legal statutory lien on the crop, and it was first in point of time to

any claim Moseley got subsequent thereto. Kendrick is not able to enforce that lien except by the aid of a Court of equity, and that he now asks. Paragraph 4, complaint. Moseley got thereafter a rightful possession of the land, and the crops which issued thereout, and which last was created by labor supplied by third parties and by live stock and fertilizer supplied by Moseley; and Bates is yet Moseley's debtor. Each party knew the circumstance of the other. Kendrick's right is legal only; Moseley's right is equitable only. But Kendrick cannot enforce his right except at the hand of a Court of equity; and that he now expressly asks. It is plainly a case for the application of the maxim of equity, "He who seeks equity must do equity."

It is conceded on all hands, and was so conceded below, that one-half the proceeds of the seven bales of cotton must go to the laborers who made it. What is Moseley's equity in the other half?

He finds it in his hands subject to a mortgage. His land mortgage creates no lien upon it, neither does his possession of it. He may not keep it, therefore, to pay his debt. But Moseley produced the cotton. Without him it would not have been. Manifestly it would not be just to require him to turn it into Kendrick's hands until he had taken out of it that which it cost to make it; and, under the testimony, that is the service of the live stock and implements which cultivated the crop, and the cost of the fertilizer which stimulated the crop. It is not clear that this question was made below, but some of the exceptions seem wide enough to cover it, and it is the justice of the case.

The cause ought to be remanded to the Circuit Court, to make inquiry about the matters indicated, and then to make an order in conformity with the law as herein stated. In all other respects the judgment ought to be affirmed.

MR. JUSTICE WATTS concurs in the dissenting opinion.

8851

## STANTON v. INTERSTATE CHEMICAL CORPORATION ET AL.

(81 S. E. 660.)

MASTER AND SERVANT. FELLOW SERVANT. ASSUMPTION OF RISK. CONTRIBUTORY NEGLIGENCE. NONSUIT. CHARGE.

1. Where, in an action for injuries to an employee caused by a car in a manufacturing plant jumping a switch, brought against the employer and a third person who had been superintendent, the evidence showed that the third person had ceased working at the mill nine months before the accident during which time cars were running on the track, and the third person testified that he thought the switch had been put in after he left, but did not remember, and there was nothing to show an improper construction of the switch, the third person was, as a matter of law, not liable.
2. A nonsuit cannot be granted where there is any evidence offered by plaintiff to prove his case.
3. The nonassignable duties of an employer operating cars on a track in its plant are, as to one having the right to ride on the cars without controlling their operation, to have the cars properly and safely driven by a competent servant.
4. Whether an employer operating cars on a track in its plant was guilty of actionable negligence resulting in injury to an employee in a collision between cars, *held*, under the evidence, for the jury.
5. An employee in charge of a car operated on tracks in a manufacturing plant and a water boy riding on the car when in performance of his duty not connected with the running of the car or aiding in keeping the track and switch in repair, are not as a matter of law, fellow servants, but the employee operating the car is the representative of the employer who is liable for negligence causing injury to the boy.
6. A servant assumes the risks ordinarily incident to his employment, but not the risks due to the negligence of the master.
7. Whether a servant riding on a car operated on tracks in a manufacturing plant was guilty of contributory negligence precluding a recovery for injuries in a collision with another car, *held*, under the evidence, for the jury.
8. The jury must determine under all the facts what is due care, and whether a person sustaining a personal injury exercised due care, and they must take into consideration his age, experience, mental capacity, and the dangers of the situation.
9. The Court, in an action for personal injuries to an infant employed as a water boy, may properly warn the jury of the dangers of immaturity and want of experience in determining his guilt of contributory negligence.

Before DEVORE, J., Charleston, April, 1913. Affirmed as to corporation; reversed as to Chisolm.

Action by Albert Stanton, by his guardian *ad litem*, against the Interstate Chemical Corporation and Felix H. Chisolm. From a judgment for plaintiff, defendants appeal.

The facts are stated in the opinion.

*Messrs. Smythe & Visanska*, for appellant corporation, cite: *Nonassignable duties of master*: 72 S. C. 264, 269; 39 S. C. 507; 26 Fed. 837; 66 S. C. 91, 99; 154 U. S. 349; 40 S. C. 104, 106, 107; 63 Fed. 107; 109 U. S. 483; 114 Fed. 100, note; 54 L. R. A. 106; 198 Pa. 112; 52 L. R. A. 935. *Fellow servants*: 78 S. C. 381; 25 S. C. 133; 63 S. C. 559, 576; 112 U. S. 377; 149 U. S. 375; 165 U. S. 363; 50 Fed. 728; 154 U. S. 358; 50 Fed. 185; 63 Fed. 107; 57 Fed. 188; 28 S. E. 267; 69 Fed. 358; 32 Mich. 570; 60 Miss. 977; 162 U. S. 375; 63 S. C. 559; 39 S. C. 507; 15 S. C. 443, 455; 51 S. C. 96. *Proof of negligence*: 92 S. C. 147; 110 Fed. 674; 166 U. S. 618; 152 U. S. 691; 69 S. C. 529; 66 S. C. 256; 72 S. C. 398-401. *Prima facie presumption of negligence rebutted*: 87 S. C. 176; 93 S. C. 395, 396. *A reversal as to one defendant in action for an alleged joint tort requires reversal as to both*: 59 Atl. 456; 128 S. W. 463; 43 N. E. 393, 395; 127 Pa. 831; 33 S. E. 44; 20 S. E. 480. *Master not liable for accidents*: 78 S. C. 472, 481; 90 S. C. 229, 233; 75 S. W. 689.

*Messrs. Mitchell & Smith*, for appellant, Chisolm, cite: *Judgment absolute should be given dismissing this defendant from the case*: Rule 27 of Supreme Court.

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FOOTNOTE—On the question whether a servant may assume the risk of dangers created by the master's negligence, see notes in 4 L. R. A. (N. S.) 848, and 28 L. R. A. (N. S.) 1215.

*Messrs. Logan & Grace*, for respondent, cite: *Grounds for nonsuit not urged on Circuit*: 63 S. C. 566; 78 S. C. 127; 90 S. C. 334. *Nonassignable duties of master*: 71 S. C. 56; 72 S. C. 237; 77 S. C. 336. *Liability for joint tort of master and fellow servant*: 79 S. C. 52; 84 S. C. 283; 89 S. C. 529. *Risks due to master's negligence not assumed*: 87 S. C. 213. *Care varying with capacity of employee*: 80 S. C. 240. *Refusal of nonsuit*: 78 S. C. 81; 93 S. C. 299.

April 22, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This was an action for \$10,000 for personal injuries brought by the plaintiff, an infant under 21 years. The cause was tried before Judge DeVore, and a jury, at the April term of the Court, 1913, for Charleston county, and resulted in a verdict in favor of the plaintiff against both defendants. At the close of plaintiff's evidence a motion was made by the defendants for a nonsuit as to punitive damages on the ground that there was no evidence tending to show wilfulness and wantonness, or recklessness, or either of them, and as to the whole case on the ground that the plaintiff had failed to prove any negligence on the part of the defendants; that the injury to the plaintiff was caused by the negligence of a fellow servant for which the defendant was not responsible, and that the plaintiff had assumed the risks incident to his employment. When the motion was made counsel for the plaintiff in open Court announced that they withdrew all claim for punitive damages. His Honor, the presiding Judge, refused the motion for nonsuit on the whole case. After all the testimony was in the defendants moved the Court to direct a verdict in their favor on the ground that the testimony showed conclusively that the plaintiff was guilty of contributory negligence in standing on that part of the car which was obviously the most dangerous part of it, that there was no testimony tending to

show that the switch was not in proper condition, the undisputed testimony being that the switch was in proper condition, and that if the plaintiff was injured by the negligence of any one, it was by the negligence of a fellow servant, the driver of the car which jumped the switch. The Court was requested to direct a verdict in favor of the defendant, Felix H. Chisolm, on the ground there was no evidence to connect him with the accident. The motion to direct a verdict was refused. After entry of judgment both defendants appealed.

The defendant, Felix H. Chisolm, alleges error on the part of his Honor in failing and refusing to grant a nonsuit or direct a verdict in his favor on the ground there was no evidence to connect him with the accident. These

1 exceptions must be sustained. A careful examination of all of the testimony in the case fails to disclose one particle of evidence connecting the defendant with the accident in this case. The undisputed and uncontradicted evidence in the case shows that this defendant had ceased working at the mill nine months before the accident; during all this time the cars were running up and down the track; that at the time of the accident, and for a long time prior thereto, the defendant, Chisolm, worked in the Broad street office in a clerical capacity, and had nothing whatever to do with the management and operation of the plant, at which the accident occurred; the whole testimony shows that Tudor H. Chisolm, the brother of Felix H. Chisolm, had charge of the plant and gave orders, and not the defendant. In refusing the motion made on behalf of this defendant and assigning his reason his Honor said: "Mr. Chisolm testified that he was superintendent at one time, and that this switch was put in while he was superintendent." His Honor was mistaken as to the testimony. Chisolm's testimony was that he had been superintendent, but was not superintendent when track was laid and switches put down; that he had left there in September, and thought the switch had been put in

after he left, but did not remember and would not swear that it had been put in after he left the plant, and it might possibly have been put in while he was there. There is neither allegation nor proof going to show an improper construction of the switch, or installation of the same, so as to connect the defendant, Felix H. Chisolm, with it; the allegation in plaintiff's complaint being: "In causing and allowing said switch to be in such condition as to allow another car to collide with the car upon which said plaintiff was riding." We fail to find any testimony in the case warranting a verdict against this defendant, and his Honor was in error in not granting the nonsuit asked for in the first instance by him, and in refusing to direct a verdict for him in the second instance. These exceptions are sustained and a nonsuit directed as to Felix H. Chisolm, and proceedings as to him dismissed. The exceptions of the Interstate Chemical Corporation are: The first exception, subdivided in five, alleges error on the part of his Honor in not granting a nonsuit, and is as follows: The said defendants submit that his Honor erred in refusing the motion for a nonsuit, and assign the following grounds of error: That his Honor erred in holding that it was nonassignable duty of the master to have its cars safely and properly driven, whereas, his Honor should have held that Eugene Nelson was a fellow servant of the plaintiff; (2) that his Honor erred in failing and refusing to hold that the plaintiff had failed to prove any negligence on the part of the defendants; (3) that his Honor erred in refusing to hold that the plaintiff failed to prove that he was injured by negligence on the part of the defendant; (4) that his Honor erred in failing and refusing to hold that the plaintiff assumed the risks incident to his employment; (5) that his Honor erred in failing and refusing to grant a nonsuit on the ground that the only testimony tending to show negligence of any one was that the car which collided with the car upon which the plaintiff was riding was going too fast, and that "this was a scintilla of evidence of negli-



gence on the part of the defendant," whereas, his Honor should have held that if the car was going too fast, and was being operated in a negligent manner, the negligence was that of a fellow servant for whose negligence the plaintiff cannot recover. The second exception contains six subdivisions, and alleges error on the part of his Honor in refusing to direct a verdict for the defendant, and is as follows: The said defendants submit that his Honor erred in failing and refusing to direct a verdict in favor of the plaintiff, and assign the following grounds of error: (a) That the testimony shows conclusively that the plaintiff was guilty of contributory negligence in standing on the part of the car which was obviously the most dangerous part of the car. (b) That there was no testimony whatever tending to show that the switch was not in proper condition, the undisputed testimony being that the switch was in proper condition. (c) That if the plaintiff was injured by the negligence of any one it was by the negligence of a fellow servant, to wit, Eugene Nelson, the driver of the car which jumped the switch. (d) That his Honor erred in holding that Eugene Nelson, who was running the car which collided with the car on which the plaintiff was riding, was a representative of the master, whereas, his Honor should have held that Eugene Nelson was a fellow servant of the plaintiff. (e) That his Honor erred in holding that the master had to have a representative on the car which collided with the car upon which the plaintiff was riding, and that the said Eugene Nelson, who was in charge of the said car, was a representative of the master; whereas, his Honor should have held and decided that the said Eugene Nelson was a fellow servant of the plaintiff. (f) That his Honor erred in holding: "The general rule is that when a switch is properly thrown, the car goes where you want it to. Now, here is a car that did not go that way. What inference is the jury going to draw from that? I cannot tell. That is a question of fact for the jury." Whereas, his Honor should have held that

the mere fact of the occurrence of an accident does not prove nor presume negligence on the part of a defendant.

If there was any evidence offered by the plaintiff to prove his case, then a nonsuit could not be granted. The plaintiff by the fifth paragraph of his complaint specified what the

negligence of the defendant was: (a) In causing and

2, 3 allowing a car to come into collision with the car on

which plaintiff was riding; (b) in causing and allow-

ing said switch to be in such a condition as to allow another car to collide with the car upon which plaintiff was riding;

(c) in causing and allowing the car to collide with the car upon which the plaintiff was riding to be operated at such a high and dangerous rate of speed as not to be under control

so as to be stopped in time to avoid said collision and injury to the plaintiff. It has been held that the nonassignable

duties of a master are: (a) To furnish safe and suitable machinery and appliances, and to see that they are kept in proper repair; (b) to provide a safe place in which to work;

(c) to employ a sufficient number of servants to perform the labors of their employment; and (d) to select competent servants. *Biggers v. Catawba Co.*, 72 S. C. 264-269, 51 S.

E. 882. It was the nonassignable duty of the master in this case to have its cars properly and safely driven, and to have

a competent servant to perform that duty, and there was sufficient evidence in the case to go to the jury for them to

determine whether or not there was negligence on the part of the defendants in the particulars specified in plaintiff's complaint.

There was evidence of collision between defendant's cars, and that by reason thereof plaintiff was injured. There was

evidence that there was but one man in charge of the colliding car called No. 2, and he was both motorman and

4 conductor; he had full charge of the car, and could

direct where those who got on the car should ride.

There was some evidence that the car was running too fast, and that it ran off of the switch in colliding with car No. 1,

and there was testimony that the switch was not properly set, that when improperly set the car could run off, and when properly set it could not, and that on the day after the accident it was repaired for greater safety. It was the duty of the master to keep the switch in proper repair and position. As was held in *Richey v. Railway*, 69 S. C. 387, 48 S. E. 285: It was the duty of the master to keep the switch in such position as to render the tracks in the yard safe while the trains were being made up, and if plaintiff's intestate was injured while engaged in the performance of his duties as conductor as a direct and proximate cause of negligence on the part of the defendant in failing to keep the switch in proper position, then the defendant becomes liable for such injury. Where it is conceded that the switch was not in proper position when plaintiff's intestate was killed, and that was the direct and proximate cause of his death, this makes a *prima facie* case of negligence against the defendant. *Branch v. Railway*, 35 S. C. 405, 14 S. E. 808; *Hicks v. Railway*, 63 S. C. 559, 41 S. E. 753; *Trimmier v. Ry. Co.*, 81 S. C. 211, 62 S. E. 209.

There is no question that the evidence shows that Nelson was in charge of the car as the representative of the master under the authority of *Boatwright v. R. R. Co.*, 25 S. C. 128, quoted with approval in *Hicks v. Railway*, 63 S. C. 567, 41 S. E. 753.

The test as to who are fellow servants is, in the character of the act being performed by the offending servant, whether it was the performance of some duty the master owed to the injured servant, the performance of which duty the master had entrusted to the offending servant. *Brabham v. Tcl. Co.*, 71 S. C. 53, 50 S. E. 716; *Martin v. Guano Co.*, 72 S. C. 237, 51 S. E. 680; *Lyon v. Railway*, 77 S. C. 336, 58 S. E. 12. We do not think that Eugene Nelson and the plaintiff were fellow servants. Nelson was the motorman in full charge of the car; the plaintiff was a water boy, and had nothing to do with running the car, or aiding or assisting in

keeping the switch and track in repair. The plaintiff was ordered by Mr. Tudor Chisolm, assistant superintendent, to go to the shop and get ice, to carry to the men on the wharf, at the scales; he got the money in the office from Mr. Black, and got on the cars to carry out his instructions. It was the custom to ride on the cars when they were running, and the evidence shows this was known to the officers of the company, and that he rode on the steps, and had been on the steps at the same time Mr. Chisolm was riding on the steps. There was sufficient evidence to carry the case to the jury as to whether or not the defendant was negligent as to the switch, or whether the negligence of the master's representative, Nelson's actions and conduct, was the direct and proximate cause of the injury of plaintiff, or if there was a joint tort of Nelson and the master.

We do not think the Judge was in error in not granting the nonsuit on the ground of assumption of risk as contended for by the appellant. "A servant assumes the risk ordinarily incident to his employment, but not those  
6 risks which are due to the negligence of the master."

*Lewis v. Bldg. Co.*, 87 S. C. 213, 69, S. E. 213. The evidence shows the plaintiff was office and water boy, and his injury did not come from anything ordinarily incident to that employment.

We do not think that the only inference that could be drawn from the evidence was that the plaintiff was guilty of contributory negligence in riding on the steps of the car, and that the evidence showed that the place he was  
7 riding on was obviously dangerous. The jury could infer from the evidence that it was not more dangerous to ride on the steps than it would have been to have ridden on the tub, where it is contended he ought to have ridden. He had the right to assume that the car, switch, and roadbed were in reasonably safe and proper repair, and that the car would be properly operated and run by the motor-man. Under the facts as proven by the evidence in the case

it would have been manifest error on the part of the Judge to have directed a verdict on the ground that the plaintiff was guilty of contributory negligence; it was for the jury to settle and determine these issues.

Exception 3 complains of error on the part of his Honor in charging the jury that the question of injury caused by a fellow servant did not arise in the case, and not to consider that defense; whereas, he should have charged that Eugene Nelson was a fellow servant of the plaintiff, and they complain further that what he did say was a charge of facts. We fail to see that his Honor charged on the facts as complained of because the pleadings in the case, admissions, and evidence showed beyond dispute that Eugene Nelson was in sole charge of the car as representative of the master, and the plaintiff was in a different department of labor, and was in nowise a fellow servant of Nelson, and as a matter of law his Honor was correct in holding that he was not under the undisputed evidence in the case.

Exception 4 complains of error in not charging all of defendant's twelfth request by leaving out the last part, to wit, "proper care does not vary with the varying capacities or individualities of man," on the ground that the

8 request is a sound proposition of law. We do not see that the defendant was in any manner prejudiced by this refusal. It is for the jury to determine under all the facts and circumstances in each particular case what is due care, and whether or not the party injured exercised due care under the circumstances of the situation, and they, the jury, take into consideration the age, experience, mental capacity, and dangers of the situation, and arrive at their conclusion as to whether or not due care was exercised under all of the circumstances of the case; and, under his Honor's charge taken as a whole, we fail to see anything that he charged or failed to charge that could have mislead the jury to the prejudice of the defendant.

The Court if it sees fit may properly warn the jury in any case of the dangers of immaturity and want of experience.

REF.]

November Term, 1918.

*Gadsden v. Power Co.*, 80 S. C. 240, 61 S. E. 960. All exceptions of the defendant, Interstate Chemical Corporation, are overruled, and judgment as to it affirmed. Judgment as to Felix H. Chisolm reversed and order of nonsuit, asked for by him in Circuit Court, granted, and proceedings as to him dismissed.

MR. JUSTICE HYDRICK, *dissenting*. I concur in reversing the judgment as to the defendant, Chisolm, and dissent from the affirmance of it as to the other defendant.

8852

## SIMKINS v. WESTERN UNION TELEGRAPH CO.

(81 S. E. 657.)

TELEGRAPHS AND TELEPHONES. DELAY IN DELIVERY OF MESSAGES. PLEADING. DAMAGES.

1. A party to a contract, to recover special damages for a breach thereof, must allege that the adverse party, at the time of making the contract, knew the peculiar circumstances which would give rise to special damages in case of a breach.
2. The Court, in determining the sufficiency of the complaint, in an action against a telegraph company for delay in the delivery of a message, causing loss of compensation for professional services, as stating a cause of action for special damages, may consider the message set out in the complaint as read in the light of the attendant circumstances known to the company, as alleged in the complaint.
3. A demurrer to a complaint admits every fact alleged in the complaint and every fact which may be reasonably inferred from those directly alleged.
4. A complaint, in an action against a telephone company for delay in delivering a message asking plaintiff to go to a designated place and represent the sender before a body, which alleges that plaintiff was an attorney, and was known to the agents of the company, and that the company knew that the sender's purpose was to engage the professional services of plaintiff, and that, because of delay in the delivery of the message, plaintiff could not render the services, and was deprived of a reasonable compensation therefor, states a cause of action, as against a demurrer, for special damages for loss of compensation.

5. A telegraph company, when sued for delay in the delivery of a message, may not complain of the defect in the complaint whereby evidence to prove notice that special damages would result from delay in delivery is set out instead of the allegation of notice.

Before BOWMAN, J., Edgefield, March, 1913. Reversed.

Action by S. McGowan Simkins against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals.

*Messrs. E. H. Folk and B. E. Nicholson*, for appellant, cite: *Nature of damages alleged*: 71 S. C. 85; 37 Cyc. 1766; 65 S. C. 491; 93 S. C. 318; Mood Case, 40 S. C. 524, distinguished. *Telegram gave notice of damages on its face*: 70 S. C. 16, 422; 75 S. C. 512.

*Messrs. Nelson, Nelson & Gettys*, for respondent, cite: 40 S. C. 524. *Telegram gave no notice of special damages*: 71 S. C. 29; 68 Miss. 307; 8 So. 746; 71 S. C. 82; *Ib.* 211.

May 12, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

The plaintiff, who is an attorney at law, brought this action to recover damages for the alleged negligence of defendant in failing to transmit and deliver with reasonable promptness the following message, which was addressed to him: "Go to Columbia tomorrow. Represent me before executive committee." The message was sent by Mr. W. Jasper Talbert, from Parksville, to the plaintiff, at Edgefield; both places being in Edgefield county. It was filed about 7 o'clock p. m., September 3d, and delivered the next morning, about 9 o'clock, too late for plaintiff to catch the

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FOOTNOTE—On the question of loss of opportunity to respond to a call for professional services as a ground for action against telegraph company, see note in 14 L. R. A. (N. S.) 533.

REP.]

November Term, 1918.

last train leaving Edgefield that day at 9:10 o'clock a. m. for Columbia. Mr. Talbert had been a candidate in the Democratic primary election, held in the latter part of August, for the purpose of nominating a candidate of the party for the office of United States Senator, and desired to contest the election before the State executive committee, which met at Columbia, on September 4th. The damage alleged was the loss of the fee which plaintiff would have been entitled to charge for his professional services in representing Mr. Talbert before the executive committee.

The defendant demurred to the complaint for insufficiency, on the ground that the damages sued for are special, and there is no allegation that, when the contract was made,

defendant knew the special circumstances out of

1 which such damages would result, if the telegram was not promptly delivered. We have frequently held that to recover special damages, arising out of breach of contract, it is necessary to allege and prove that, when the contract was made, defendant knew the peculiar circumstances which would give rise to such damages, in case of a breach thereof.

The complaint is sufficient if it alleges knowledge of facts and circumstances from which a person of ordinary intelligence and prudence should have known that such damages would result from delay in delivering the message,

2 for facts are well pleaded which may, by reasonable intendment, be inferred from the facts and circumstances directly alleged. Therefore, in determining the sufficiency of the allegations of the complaint in which the telegram is set out in full, we may consider the information which the telegram itself afforded, when read in the light of the attendant circumstances known to defendant, and also alleged in the complaint.

The complaint alleges that plaintiff is and, at the time in question, was an attorney at law, engaged in the practice of his profession, at Edgefield, and that he was well known to



the agents of defendant. The allegation of this 3, 4 knowledge in connection with that afforded by the message is a sufficient allegation, at least by intentment, that defendant knew that Mr. Talbert's purpose was to engage the professional services of plaintiff. The law supplied an obligation on the part of Mr. Talbert to pay the plaintiff a reasonable fee for his services. The natural and reasonable inferences from these circumstances would be that delay in transmission and delivery of the message, which would prevent plaintiff from getting to Columbia in time to appear before the executive committee, might result in such damages to him as he has sued for.

Moreover, in the sixth paragraph of the complaint, it is alleged "that the defendant, its agents and servants, had full knowledge of the importance of said message, and of the importance and necessity for the prompt transmission and delivery of the same." While it is true that this is not an allegation, in so many words, that defendant knew the particular circumstances from which the special damages sued for would result, in case of delay, yet such knowledge may well be inferred from "knowledge of the importance of said message, and of the importance and necessity for the prompt transmission and delivery of the same." It must not be overlooked that the demurrer admits every fact alleged in the complaint, as well as every fact which may be reasonably inferred from those directly alleged.

The case of *Mood v. Telegraph Co.*, 40 S. C. 524, 19 S. E. 67, was relied upon by the Circuit Court as authority for sustaining the demurrer. In that case this telegram was sent to Dr. Mood: "Come to Remini soon as possible. Man cut and shot." A demurrer to the complaint, in an action to recover for the loss of a fee for professional services caused by delay in delivering the message, was sustained on the ground that there was no allegation that the defendant had notice of the damages that would result to the plaintiff, if the message was not promptly delivered, and also because

there was no allegation that the plaintiff was ready and willing to perform the services requested of him. It will be observed that, in that case, there was this additional ground upon which the demurrer was sustained. In this case, however, it is alleged that the plaintiff could and would have performed the services required, if the message had been delivered in time. Upon the question of the sufficiency of the allegation of notice, it does not appear that the Court was asked to consider, or that it did consider, the question whether the allegation in the complaint of such a telegram, addressed to a doctor, was not a sufficient allegation, at least by intendment, that defendant knew that special damages would result to the addressee from delay in delivering it. The principal question at issue in that case appears to have been whether the damages sued for were special or general, and to the decision of that question the mind of the Court was chiefly directed. It was held that they were special, and that, to recover such damages for breach of contract, it must be alleged and proved that, at the time of making the contract, the defendant knew the particular circumstances out of which such damages would result in case of a breach thereof. This ruling has been adhered to ever since. But, as we have already said, the Court was not called upon to decide, and did not decide, what effect should be given to the setting out in the complaint of the telegram, and of the indirect allegation thereby of the knowledge which it conveyed. If it is to be inferred that the fact that the message alleged was addressed to a doctor, coupled with the information which it carried upon its face, was not a sufficient allegation of notice to the telegraph company that delay in delivering the message might result in damages by way of the loss of fees for professional services, the decision is to that extent erroneous, and is not to be followed.

If it be said that the allegation of the telegram is not the allegation of the notice, which its contents may impart, but merely the allegation of the evidence by which such notice

may be proved, then the answer is that the difference  
5 is technical rather than substantial. It would have  
been more technically correct for the plaintiff to  
have alleged the facts and circumstances out of which the  
damages sued for arose, and that defendant knew of those  
facts and circumstances when it made the contract. But  
the defendant cannot complain at this fault in the plaintiff's  
pleading, whereby the evidence to prove the fact of notice is  
set out instead of the bare allegation of notice, because it has  
not been prejudiced thereby.

Judgment reversed.

MR. JUSTICE GAGE did not sit in this case.

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8697

PHILADELPHIA LIFE INS. CO. OF PHILADELPHIA, PA., *v.*  
ARNOLD *ET UX.*

(81 S. E. 964.)

INSURANCE. INCONTESTABLE PROVISIONS. CANCELLATION FOR FRAUD.

1. A life policy, providing that it shall be incontestable, except for nonpayment of premiums, after one year from its date, was not objectionable as in conflict with the State statute of limitations, but was valid.
2. Where a life policy provided that it should be incontestable, except for nonpayment of premiums, after one year from date, the insurer, after the expiration of the year, could not maintain a suit against the insured and the beneficiary to cancel the policy for the defendant's alleged fraud in procuring it.

Before DEVORE, J., Anderson, October, 1912. Reversed.

FOOTNOTE—The authorities on the question of the incontestability of life insurance under provisions of the policy or of a statute, generally, are discussed in a note in 42 L. R. A. 247. And upon the validity of a provision making policy incontestable from date, see note in 2 L. R. A. (N. S.) 821. And as to the applicability of incontestable clause to nonpayment of premiums, see note in 6 L. R. A. (N. S.) 1039. And for the applicability of incontestable clause to false statements made in application for reinstatement, see note in 46 L. R. A. (N. S.) 1056.

REP.]

November Term, 1918.

Action by the Philadelphia Life Insurance Company of Philadelphia, Pa., against Quincy L. Arnold and wife, for cancellation of certain policies of life insurance. From a decree for plaintiff, defendants appeal.

*Messrs Quattlebaum & Cochran*, for appellants. *Mr. Cochran* cites: *The incontestable clause is in the nature of a statute of limitations*: 25 Cyc. 873, 881; 19 Am. & Eng. Enc. of Law (2d ed.) 79, *et seq.*; 101 Tenn. 22; 70 Am. Rep. 650; 42 L. R. A. 247; *Ib.* 253; *Ib.* 261; 53 L. R. A. 743; 204 Ill. 549; 98 Am. St. Rep. 244; 63 L. R. A. 452; 242 Ill. 488; 134 Am. St. Rep. 337; 118 N. Y. 237; 16 Am. St. Rep. 749; 106 Tenn. 347; 82 Am. St. Rep. 885. *The following cases explained*: 50 L. R. A. 777; 43 S. E. 79; 27 L. R. A. (N. S.) 1026. *The incontestable clause valid*: 19 Am. & Eng. Enc. of Law (2d ed.) 103; 19 Cyc. 905; 25 Cyc. 910; 46 S. C. 491; 25 S. E. 189; 97 Ga. 722; 20 S. E. 169. *Any doubt as to the interpretation of the clause should be solved in favor of the insured*: 78 S. C. 77; 46 S. C. 491; 19 Am. & Eng. Enc. of Law (2d ed.) 80. *Statutory estoppel or waiver by receiving two annual premiums*: 1 Code of Laws 2722. *Answer as evidence*: 25 S. C. 181; 29 S. C. 52; 57 S. C. 293; 62 S. C. 51; 70 S. C. 474. *Falsity of representations known to insurer's agent*: 16 Am. & Eng. Enc. of Law (2d ed.) 945, *et seq.*; 88 U. S. 152; 22 L. Ed. 593; 80 U. S. 222; 20 L. Ed. 617; 79 Ark. 315; 16 L. R. A. (N. S.) 1180, 1233; 41 L. R. A. (N. S.) 505, 506, 507, 508; 82 S. C. 425. *Waiver by issuing the policies and accepting premiums with knowledge of facts*: 1 Code of Laws 2712; 88 S. C. 31; 81 S. C. 157; 79 S. C. 527; 16 Am. & Eng. Enc. of Law (2d ed.) 935, 943. *Findings of jury on issues in chancery conclusive*: Code Civil Proc. 312; 43 S. C. 264; 49 S. C. 264; 50 S. C. 283; 76 S. C. 507; 78 S. C. 193; 51 S. C. 420.

*Messrs. Bonham, Watkins & Allen*, for respondent, cite: *Insured bound by answer in application*: 77 S. C. 192; 15

Fed. Cases 158, 160; 88 S. C. 44. *Incontestability only after death of insured*: 115 N. C. 393; 20 S. E. 517. *Does not apply to right to cancel for fraud*: 43 S. E. 79; 114 Ky. 295. *Clause invalid*: 168 Pa. St. 645; 189 Mass. 555. *Statutory provisions*: 1 Code 2722, 2723; 75 S. C. 318. *Directing issues to jury discretionary*: 92 S. C. 452; 55 S. C. 276; 56 S. C. 303; 57 S. C. 163; Code Civil Proc. 312; 43 S. C. 214; Const., art. V, sec. 4. *This Court may render judgment absolute*: 92 S. C. 361; 51 S. C. 431; 45 S. C. 508; 75 S. C. 453; 47 S. C. 463; 67 S. C. 212.

December 10, 1913.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

This action was brought to have two policies of insurance, issued by the plaintiff on the life of the defendant, Q. L. Arnold, in favor of his wife, Mattie H. Arnold, cancelled on the ground that they were obtained by fraud. The policies were issued and dated June 11, 1910. The premiums were duly paid. The policies contain this clause: "This policy shall be incontestable, except for nonpayment of premiums, after one year from its date." This action was commenced June 3, 1912, more than a year after the date of the policy. On motion of defendants, issues were referred to a jury, which answered them all in favor of defendants. But the Court set aside the verdict, holding that the fraud alleged had been proved, and adjudged the policies void.

From the view that we take of the case, it will be necessary to consider only one question: Is the incontestable clause above quoted a bar to the action? The language is plain—so plain that it does not require interpretation. There can be no doubt of its meaning, and unless there is some reason why an insurance company cannot lawfully make such a contract, this action is barred. The Courts, with practical unanimity, hold such a

Rep.]

November Term, 1918.

stipulation valid. It is called by some of them a short statute of limitations in favor of the insured, and it is sustained on the analogy of the cases which hold that the parties to a contract may, by stipulation therein, fix a reasonable time within which action thereon must be brought, or claims made. We cannot agree that such a stipulation conflicts with the statute of limitations, only in the sense that by its terms of action must be brought within a shorter period than that allowed by law. But the statute of limitations does not expressly or impliedly prohibit such an agreement. It merely fixes the maximum time within which actions may be brought.

No doubt the clause was inserted in the policy as an inducement to the public to insure with the plaintiff company. It is matter of common knowledge that insurance companies have, in the past, so frequently defended

2 against claims under their policies, and tried to defeat payment of them on various grounds—sound and unsound—and especially on the ground of alleged false representations and warranties, that the legislature of this State deemed it necessary to take the matter in hand, and in 1878 (16 St. at Large, p. 530) a statute was enacted (Civ. Code 1912, secs. 2722, 2723) which provides that, when a company receives the premiums on a policy for the space of two years, it shall be deemed to have waived any right to dispute the truth of the application, or to allege that the insured made false representations. The same statute authorizes the companies to bring actions to vacate policies on that ground, but limits the time to two years from date of the policy. This legislation goes far to prevent these companies from taking a man's hard-earned money as long as he lives, and then slandering his memory after he is dead. While it is true in this case that the insured is alive, that circumstance does not make the meaning of the clause or the application of the law different from what it would be if he were dead. To hold that the clause means only

that the company cannot defend for any cause, except non-payment of premiums, after the death of the insured, is to read into the contract, by construction, what the parties did not write into it.

The objection to taking insurance, arising out of the probability of such a defense being set up, whether founded in truth or not, grew to be such that the insurance companies found it to their advantage to insert in their policies certain stipulations specifying the grounds upon which they could be contested, and limiting the time within which such contest must be made. Of course, other things being equal, the more favorable to the insured these stipulations are, the more attractive will the policies be to insurers, and we have no doubt the clause in question was inserted for that purpose, and that the company has received the benefit of it in that intending insurers have been thereby induced to take its policies.

By the stipulation, the plaintiff practically agreed that it would take a year to investigate and determine whether any fraud had been perpetrated in procuring the policies, and, if it failed within that time to discover any, it would make no further investigation, and would not thereafter contest the validity of the policies on that ground. The evidence in the case shows that, if plaintiff had been diligent, it could have discovered the fraud within the year. Therefore, we do not feel that we are condoning the fraud by enforcing the stipulation. The following authorities sustain the validity of such a stipulation: *Kline v. Nat. Ben. Ass'n*, 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703; *Wright v. Mut. Ben. Ass'n*, 43 Hun. (N. Y.) 61, affirmed 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749; *Clement v. Insurance Co.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650, and note; *Massachusetts Ben. Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; *Murray v. State Mut. Life Ins. Co.*, 22 R. I.

Rep.]

November Term, 1918.

524, 48 Atl. 800, 53 L. R. A. 743; 25 Cyc. 873, 881; 19 A. & E. Enc. L. (2d ed.) 79, *et seq.*

MR. JUSTICE FRASER, *dissenting*. I cannot concur in the opinion of the majority of the Court. I think the statutory right of the company to two years may be waived, and that the incontestable clause did waive it, except for fraud. I think the words in the incontestable clause, "all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties," clearly show that the insurer did not intend to waive any of its rights where there is fraud. The policy also provides that the question of age may be contested. The incontestable clause, therefore, was not absolute, and I think the plaintiff has the right to bring this action within the statutory period.

MR. JUSTICE GAGE did not sit in this case.

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8698; 8811

SANDERS v. SOUTHERN RAILWAY—CAROLINA DIVISION.

(81 S. E. 786.)

RAILROADS. ACCIDENT AT CROSSING. TRAVELED PLACE. OMISSION OF STATUTORY SIGNALS. APPEAL AND ERROR. CHARGE.

1. A complaint which alleged that the plaintiff was injured by a railroad train, while at a traveled place, without anything to show that it was not an ordinary public crossing, and also alleged that the bell was not rung, nor any other precaution taken to avoid injuring plaintiff, when construed liberally, as required by Code Civil Procedure, sec. 209, states a cause of action, under Civil Code, secs. 3222, 3230, requiring the ringing of the bell before the train reaches

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FOOTNOTE—Upon the question of the liability of a railroad company for personal injuries from negligent operation of trains to person on adjoining property or highway, see note in 81 L. R. A. (N. S.) 980. And as to the effect of posting signs warning trespassers on the liability of a railroad company for injury to persons walking on track, see note in 47 L. R. A. (N. S.) 506.



a place where the railroad crosses any public highway, or street, or traveled place, and allowing recovery by the person injured through the failure to give such signals.

2. One who is injured while walking along a path on a railroad right of way cannot recover, under Civil Code, secs. 3222, 3230, allowing a recovery for injuries resulting from failure of a railroad train to give the required signals before crossing a traveled place, where the only evidence of the right to use such path was that the public had used it for more than 20 years, since the public cannot acquire a prescriptive right to the use of a railroad right of way in a manner inconsistent with the right of the company, and the term "traveled place," in the statute, means a place where the public have, in some manner, acquired the legal right to travel; that is, a right which may be legally enforced, and cannot legally be denied, or interfered with.
3. Where the evidence did not entitle plaintiff to recover under the crossing signal act (Civil Code, secs. 3222, 3230), which allows such recovery unless the plaintiff was grossly or wilfully negligent, a charge submitting the case to the jury as a case under the statute was prejudicial.
4. Where there was no evidence that plaintiff was entitled to use a path along a railroad right of way which he was using at the time of his injury, an instruction submitting to the jury the question whether he had a right to be on such path was prejudicial as authorizing the jury to find that he was legally entitled to be there, and as failing to submit to them the issue whether he was a licensee or a trespasser.

Before FRANK B. GARY, J., Charleston, May, 1912.  
Reversed.

Action by Darby L. Sanders, as administrator, against Southern Railway—Carolina Division. From judgment for plaintiff, defendant appeals.

*Messrs. Joseph W. Barnwell and B. L. Abney, for appellant, cite: As to statutory cause of action: 1 Code of Laws 2132, 2139; 41 S. C. 86; 91 S. C. 546; 41 S. C. 1. No evidence of statutory traveled place: 67 S. C. 499; Jones, Easements, sec. 281; 85 S. C. 442, 444. Harmless error: 93 S. C. 395. Common law cause of action: 61 S. C. 556. Licensee: 67 S. C. 499. Trespasser: 90 S. C. 262.*

*Messrs. Logan & Grace*, for respondent, cite: *Exceptions too general*: 82 S. C. 328; 88 S. C. 83; 63 S. C. 528; 68 S. C. 62. *Traveled place*: 67 S. C. 499; 41 S. C. 20; 85 S. C. 440; 92 S. C. 291. *Remedy for indefiniteness*: 84 S. C. 140; 91 S. C. 548; 78 S. C. 324. *Failure to give statutory signals in common law action*: 52 S. C. 328; 57 S. C. 54; 92 S. C. 301; 92 S. C. 171.

April 21, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

While Robert Sanders was walking along defendant's right of way, going from Columbus street to Line street, in the city of Charleston, he was knocked down and run over by a box car, which was being pushed by a switch engine, and his leg was cut off. He recovered judgment against defendant for \$12,500 damages for the injury. He died a short time after the verdict was rendered, and the action was continued in the name of the plaintiff, as administrator of his estate.

That part of defendant's right of way which lies between Columbus street and Line street is a parallelogram in shape. It is about 39 feet wide, and the distance between the streets is 491 feet. Besides the main track, it has on it five side-tracks and numerous switches connecting them with each other and with the main track. It is a part of defendant's switch yard, where switching is constantly being done. The west end of a public court, called Addison's court, which is 18 feet wide, abuts on the right of way about two-thirds of the distance from Columbus to Line street. This is in a populous part of the city, and, for more than 20 years, the public has used that part of defendant's right of way for a walkway between said streets, and between Addison's court and the streets. Whether they did so with the knowledge and acquiescence of the railroad company, and were licensees, or against its objection and in spite of its

notices forbidding such use, and were trespassers, was one of the issues of fact which was hotly contested at the trial in the Court below.

The first question presented by the appeal is whether the allegations of the complaint are sufficient to  
1 bring the case under the crossing statutes (sections 3222 and 3230 of the Civil Code of 1912).

Section 3222 requires that the bell shall be rung or the whistle sounded 500 yards from the place where the railroad crosses "any public highway or street or traveled place," and be kept ringing or whistling until the engine has crossed the same.

Section 3230 reads: "If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding section, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law; and that such gross or wilful negligence or unlawful act contributed to the injury."

The second and third paragraphs of the complaint are as follows:

"(2) That on or about the 8th day of August, 1907, at and between the hours of 5 and 6 o'clock p. m., the plaintiff above named, while on the east side of said defendant corporation's railway track, and at a point between Addison court, a public court in the city of Charleston, and Line street, a public street in the city of Charleston, and while at a traveled place and walkway and place where all people and the public in general have been passing and repassing

for more than 20 years last past, and at a point where said defendant's railway track traverses a populous part of the city of Charleston, and a place much frequented by people passing to and fro along said railway going from Columbus street, one of the public streets of the city of Charleston, and from Addison's court, a public court in the city of Charleston, to Line street, another public street in the city of Charleston, all of which facts were well known to the defendant and its agents, servants and employees; the said defendant corporation, its agents and servants, so negligently, recklessly, carelessly and wantonly ran, managed and operated one of its trains of cars that said train of cars approached said traveled place or walkway and populous part of the city of Charleston at a high and dangerous rate of speed, and without giving any signal by ringing the bell, so that the said plaintiff might have been made aware of the approach of said train of cars, or taking any precaution whatever to avoid injuring said plaintiff, so that said plaintiff was unaware of the approach of said train of cars, and said train of cars struck said plaintiff with terrific force and violence, crushing and mangling plaintiff's leg, and bruising and injuring his face, and shocking his whole system.

"(3) That the injuries to the plaintiff as aforesaid were caused to the plaintiff by the negligence, carelessness, recklessness, and wantonness of the said defendant corporation, its agents and servants, in approaching said traveled place or walkway and populous part of the city of Charleston at a high and dangerous rate of speed, and in not giving any signal by ringing the bell of said locomotive or taking any precaution whatever to avoid injuring said plaintiff."

Taking the foregoing allegations without the explanatory aid of the evidence showing the location of the right of way, the streets, and Addison's court, it could not be said with certainty that the place where plaintiff's intestate was injured was not an ordinary crossing. Therefore, in view of the allegation which is repeated several times, that plain-

tiff was injured at "a traveled place," and that he was run down without any signal by ringing the bell or taking any precaution whatever to avoid injuring him, and giving these allegations a liberal construction, as we are required to do by the Code of Procedure (section 209), we think it clear that the complaint makes a case under the statutes.

In *Easterling v. Railroad Co.*, 91 S. C. 546, 75 S. E. 133, the complaint alleged that Easterling "was crossing a public crossing and traveled place" when he was struck and killed by an engine and train of cars operated by the defendant railroad company. And it was alleged that his death was caused by the negligence, etc., of the defendant in "failing \* \* \* to give any signal by ringing the bell or sounding the whistle or in any other way whatsoever of the approach of said locomotive and train of cars to said public crossing or traveled place." Those allegations were held sufficient to bring the case under the statute. The Court also said that if the allegations were so indefinite as to leave the matter in doubt, the remedy was by motion to make the complaint more definite and certain. That case seems to be conclusive of the question.

We think, however, that the Court erred in submitting the case to the jury as one under the crossing statute, because the testimony failed to sustain the allegation that the injury occurred at a traveled place. In several

2 cases this Court has defined a traveled place to be one where people are not only accustomed to travel, but also have, in some way, acquired a legal right to travel. *Hale v. Railroad Co.*, 34 S. C. 299, 13 S. E. 537; *Barber v. Railroad Co.*, 34 S. C. 450, 13 S. E. 630; *Hankinson v. Railroad Co.*, 41 S. C. 20, 19 S. E. 206; *Strother v. Railroad Co.*, 47 S. C. 375, 25 S. E. 272; *Risinger v. Railroad Co.*, 59 S. C. 429, 38 S. E. 1; *Kirby v. Railroad Co.*, 63 S. C. 494, 41 S. E. 765.

When we speak of a legal right, we mean a right of such nature that it can be legally enforced, and cannot be lawfully denied or interfered with. There is no evidence that

the public or the plaintiff's intestate had acquired any such right to travel where the injury occurred. The only evidence suggestive of such right is that the public had used the right of way for more than 20 years, under such circumstances as would ordinarily have given rise to a prescriptive right to travel there. But we have held that the public cannot acquire by prescription the right to use the right of way of a railroad company in a manner inconsistent with the company's right to use it for the purpose for which it was acquired. *Matthews v. Railway*, 67 S. C. 499, 46 S. E. 335, 65 L. R. A. 286; *Blume v. Railway*, 85 S. C. 440, 67 S. E. 546. Under the law as declared in these cases and the evidence in this case, the most that the plaintiff could have contended for was that he was a licensee, and entitled to ordinary care to prevent his injury.

As the facts do not bring the case within the statute, it requires no argument or citation of authority to show that defendant was prejudiced by the Judge's charge, submitting it to the jury as a case under the statute. There

3 are material differences between a case at common law and one under the statute. In a case at common law, plaintiff must prove the failure to ring the bell or blow the whistle, that the omission was negligence, and that such negligence was the proximate cause of the injury. In a case under the statute, if the plaintiff proves the failure to give the signals required, it is negligence *per se*, which is presumed to have caused the injury. *Strother v. Railway*, *supra*. In the former, the action will be defeated, if the defendant proves that the plaintiff was guilty of ordinary contributory negligence. In the latter, defendant must prove that plaintiff's contributory negligence was gross or wilful, or that he was acting in violation of law, and that it contributed to the injury. *Lee v. Railroad Co.*, 84 S. C. 125, 65 S. E. 1031.

The jury were instructed several times that they should determine the nature of the place where the injury occurred, and whether plaintiff's intestate had the right to

be there. The Court evidently meant, and the jury  
4 must have so understood it, that they should inquire  
whether plaintiff's intestate was there under such a  
legal right that defendant could not lawfully prevent him  
from being there. Plaintiff's attorneys contend, how-  
ever, that, even if such charge was erroneous, it was harm-  
less, because the defendant owed plaintiff's intestate the  
same degree of care, whether he was there under a legal  
right or as a licensee. But that contention cannot be sus-  
tained, because it assumes that, even if plaintiff's intestate  
was not there under a legal right, he was there as a licensee,  
which was stoutly denied by defendant. On the other hand,  
if the jury had been instructed, as they should have been,  
that the public could not acquire, and that intestate had not  
acquired such right by prescription, the issue would have  
been narrowed to the question whether he was a licensee  
or trespasser; and, in that event, if the jury found that the  
notices had been posted and kept posted, and that intestate  
went upon the right of way in defiance of them, he was a  
trespasser, and entitled only to immunity from reckless or  
wanton injury. In *Lamb v. Railroad Co.*, 86 S. C. 106, 67  
S. E. 958, 138 Am. St. Rep. 1030, the Court said: "When  
a railroad company or other owner of dangerous property  
warns persons against its use, those who insist on incurring  
the peril of using it, however numerous they may be, have  
no right to charge the owner with acquiescence in the use.  
\* \* \* As was well remarked by the Court in *Burns v. South-  
ern Ry. Co.*, 63 S. C. 46, 40 S. E. 1018, the care required  
of owners of such property does not extend to the guardian-  
ship of those who insist on becoming trespassers and using  
the property of others unlawfully." It is clear, therefore,  
that the error was prejudicial, and requires reversal of  
judgment.

The judgment of the Circuit Court is reversed.

MESSRS. JUSTICES FRASER and GAGE concur.

REP.]

November Term, 1918.

MR. JUSTICE GAGE, *concurring*. I concur with MR. JUSTICE HYDRICK and MR. JUSTICE FRASER.

The sole issue is whether the testimony brings the cause within the crossing statute, for the Court below held that it did. More exactly, the question is: Does the testimony make out the locus of injury to be a traveled place? for there is no real contention that the transaction happened where the railroad crosses a street. The words "traveled place" have been given a meaning now fixed in the cases. They mean a place where the person has acquired the *right* to travel; and that is not included by a place where a person has been *permitted* to travel.

In this case there is no testimony tending to show that the plaintiff had the *right* to walk along the track. He could not get such a right at this particular place by adverse use if the exercise of the right would impair the railroad company's use of the track; and the testimony makes it plain that such would be the case. There is testimony tending to show that the plaintiff had been impliedly invited by the defendant to walk where he did; that is to say, the plaintiff was licensed to walk where he did. In the first instance, where the person walks by right, he is entitled by statute to a particular warning. In the second instance, where the person walks by license, he is not named in the statute as entitled to the particular warning. But respondent relies on the Clifford case, 87 S. C. 324, 69 S. E. 513, to show his right to the statutory signal. In that case, Mrs. Clifford was confessedly crossing the track; she was at a place where she had a right to be; and she therefor had the right to the signal, for the statute *named her*. The respondent also contends that the failure to give the statutory signals tends to prove wilfulness; and *per contra*, if there was wilfulness, the fact may be proved by failure to ring and blow.

It is true the complaint alleged wilfulness, but the Court did not charge upon that subject; the counsel did not tender any request on that subject; the jury did not find spe-



cifically on that subject; and it was not presented to the jury at all. If the verdict for negligence must go, so also must that for wilfulness. *Jones v. Railroad*, 70 S. C. 217, 49 S. E. 568.

I am, therefore, of the opinion that the failure to ring the bell and to blow the whistle, if there was such failure, did not make a case of negligence *per se*; that the issue was: (1) Did the defendant invite plaintiff to walk on the track? (2) If so, did the defendant fail to exercise towards him ordinary care? And what was ordinary care is a question for a jury; and it may be a jury might consider the failure to ring and to blow is evidence of such lack of care, but not necessarily so.

MR. CHIEF JUSTICE GARY, *dissenting*. The appellant's attorneys, in their argument, state that the two principal questions presented by the exceptions are: First, whether a statutory cause of action is set out in the complaint; and, second, whether the jury should have been instructed that there was no testimony tending to show that the injury was sustained at a "traveled place," within the contemplation of the statutes. I concur in the opinion of MR. JUSTICE HYDRICK as to the first question, but dissent as to the second.

The following testimony appears in the record:

Robert B. Sanders, the original plaintiff, testified as follows: "Q. Do you know whether or not that portion of the city, between Columbus and Line streets, and Addison's court and Line street, is a populous place? Do or not many people live there? A. A good many. Q. Thickly settled? A. Yes, sir. Q. Do you know whether or not that place has been used for more than 20 years by people passing to and fro? A. Yes, sir. Q. That is to say, from Columbus to Line street from Addison's court to Line, and from Addison's court to Columbus? A. Yes, sir. Q. Who passed through there? A. I saw men, women, and children going

REF.]

November Term, 1918.

through there. Q. At all times? A. Well, the children went there principally from school, the men and women passed through any time they wanted to. Q. Now, will you state whether or not there are yards and doorways that open on this track? A. Yes, sir. Q. Do you know where Mr. Doscher's house is? A. Yes, sir. Q. Is not that house on the southeast corner of Line and the railroad track? A. Yes, sir. Q. Will you state whether or not there is a regular doorway, leading from the piazza of that house to the railroad track? A. Yes, sir. Q. Do you know where Shumacher's lots are? A. Yes, sir. Q. Are they or not on the west side of the track? A. Yes, sir. Q. Is not there a doorway leading from these rooms on the track? A. Yes, sir. Q. State whether or not Addison's court at this time was open to the public? A. Yes, sir. Q. Was there or not a constant passage of people from Addison's court to Line street, and from Line street back? A. Yes, sir. Q. Is or not Addison's court a regular public court of the city of Charleston? A. I take it to be such. Q. Just as any other court? A. I take it to be the same as all other courts. Q. Now, Mr. Sanders, you know where the Columbus street crossing is? A. Yes, sir. Q. That is a regular public crossing? A. Yes, sir. Q. Now, Mr. Sanders, don't you recollect there used to be a fence across Addison's court? A. Yes, sir."

Isaac Briggs, a witness for the plaintiff, thus testified: "Q. Will you not state to these gentlemen whether or not people, men, women, and children, pass constantly from Columbus to Line street and from Addison's court up there? A. All my life, since I was a little boy. Q. Did you not, Mr. Briggs, ever know the railroad to stop any one going through there? A. Never did. Q. Did you not see any signs telling you you could not go there? A. Never did. Q. Did or not any railroad people ever warn you to stay off that property? A. No, sir. Q. And you say you saw people walking through there? A. Women and

children; men, women, and children. Q. Did they or not pass there just as they would pass through Meeting street, or any place that people pass through? A. I passed through there all the time. I lived on Cooper street 35 years, and I would go from Meeting to Line, and through the railroad to Columbus street, and return the same way, and have never been molested by anybody. I have since this trouble one time; I saw a sign there since this trouble. Q. Will you state whether or not Addison's court is a public court? A. Public thoroughfare for everybody. Q. And you never saw anybody stopped? A. No, sir. Q. And you have known it since you were eight years old? A. Yes, sir. Q. Don't you recollect that fence that used to be across Addison's court? A. I recollect a piece of fence, but it always had an opening to go through. Q. And then it was gradually broken down and you could go through it? A. Yes, sir. Q. It was built there new; how could you go through? A. Through an opening or gate. Q. But there was a fence over a part of it? A. Yes, sir."

C. M. Church, another witness for the plaintiff, testified as follows: "Q. Now, Mr. Church, will you state to the Court and jury whether or not you know the locality between Columbus and Line streets and between Addison's court and Line street? A. Yes, sir; I know it thoroughly from childhood; it was my playground when I was ten years old, in my school days going through from Meeting to the Bennett school, and I would play there in the evening, hunt the ball on the railroad track, and never was stopped. Q. Do you know whether or not men, women, and children generally pass and repass that property? A. Lots of them. Q. Have you or not ever seen any of them turned back, stopped? A. None that I know of. Q. Did you ever see any signs there warning people to keep off? A. I don't remember seeing signs there until lately. Q. Was or not it possible to pass from Addison's court right on to Line street. A. Oh, yes, sir. Q. And did or not people pass from Line

REP.]

November Term, 1918.

street to Addison's court, and from Addison's court to Line street? A. Yes, sir. Q. Is or not that a thickly settled and populous part of the city of Charleston? A. A good many people live there. Q. The old South Carolina and Georgia depot used to be just north of that place? A. Yes, sir. Q. Is there or not a well-beaten track going through there, on the east and west side of that place, from Line to Columbus and from Addison's court to Line street and back? A. Yes, sir. Q. A well-beaten path? A. Yes, sir. Q. And in all the time you have known it—how many years have you known it, 35 years? A. About 45 years. Q. And in that time you have always known people to pass to and fro, without any stoppage by the railroad company? A. Yes, sir."

Patrick O'Grady thus testified in behalf of the plaintiff: "Q. Do you know where Addison's court is? A. I do. Q. Is or not Addison's court between Line street and Columbus street? A. It is; yes, sir. Q. Do you know whether or not people residing in Addison's court pass through there to Line street and back to Addison's court? A. I have seen them; I saw a wagon unload at Mr. Doscher's house, unload wood and go through the railroad into Addison's court, and out through Meeting street. Q. You have seen a wagon unload at Mr. Doscher's and go through Addison's court? A. Yes, sir. Q. Does or not the door of Mr. Doscher's piazza open out on the railroad track? A. It does. Q. And you never have seen anybody stopped from going through there? A. No, sir. Q. How long have you known that place? A. About 35 years. Q. And people have always used it going to and fro; there is a well-beaten path there? A. Yes, sir."

This testimony undoubtedly tended to show that the plaintiff was injured at a place where the public was accustomed to travel, and that the user by the public was open, continuous, and adverse, or upon the invitation of the defendant.

In *Strother v. Railway*, 47 S. C. 375, 25 S. E. 272, the issue as to whether there was any testimony tending to show that the injury was sustained at a "traveled place" was properly submitted to the jury upon testimony not near so strong as in this case.

The appellant contends, however, that this was not a traveled place, within the contemplation of sections 2132 and 2139, Code of Laws 1902 (now sections 3222 and 3230, Code of Laws 1912), on the ground that the public did not have the *right* to use said land for the purpose of travel.

In the case of *Hankinson v. Railway*, 41 S. C. 1, 19 S. E. 206, the Court used the following language: "The rule, as we understand it, is that, to constitute 'a traveled place,' it must not only be a place where persons are accustomed to travel, but it must also be a place where persons have in some way acquired the *right* to travel. \* \* \* The fact that all persons who desired to do so had been accustomed to use the footpath at the crossing in question, with the knowledge and acquiescence of the railroad company, was not of itself sufficient to establish the legal right to cross; but there must be something more, something to show an adverse use of the crossing, or something to show that the railroad company recognized the *right* of the public to cross at the point in question. The same principles which govern, where the question is as to an alleged right of way over the lands of a landowner, acquired by prescription, must govern here. There the doctrine is that the mere fact that persons have, for any number of years, been accustomed to use the way in question is not sufficient, but there must be something to show that such use was of an *adverse* character, or that the owner of the soil had in some way recognized the *legal right* of persons to use the way." The Court then proceeds to quote the following language from the case of *Sims v. Davis*, Cheves 1, 34 Am. Dec. 581: "The use of every such way is permissive, or held at sufferance, where the claimant has done no act showing that

he claimed the right adversely, and the allowance of the use by the owner of the soil has been unaccompanied by any act, which shows a recognition on his part of the right of the claimant to use the road without his permission."

The case of *Hankinson v. Railway*, 41 S. C. 1, 39 S. E. 206, decides that the public cannot merely by using a foot-path over a railroad company's right of way, with the knowledge and acquiescence of the railroad company, for more than 20 years, acquire a legal right to travel the pathway; but that it can acquire a legal right to use such pathway, if the user has been adverse, or the railroad company has, during that time, recognized the legal right of the public to use the pathway. The case just mentioned does not characterize the relation which the public, after acquiring such legal right, would sustain to the railroad company, but the case of *Matthews v. Railway*, 67 S. C. 499, 46 S. E. 335, 65 L. R. A. 286, shows it would be that of a licensee.

In the last-mentioned case the Court says: "The public may no doubt acquire a *right* to use a particular way over lands set apart for a railroad right of way by use clearly shown to be adverse for 20 years, in the sense that, after the lapse of that time, the railroad authorities cannot arbitrarily forbid the use of such way for any reason not connected with the operation of the railroad; but since the company cannot grant its right of way so as to defeat the purpose for which it was acquired, and it cannot be condemned for another highway so as to hinder these uses, it cannot be presumed that there ever was any grant or dedication to a public use inconsistent with the purpose for which the property was acquired by State authority. \* \* \* Those who walked in the path here described entered, not a public highway, but the property of the railroad company as licensees. \* \* \* It is, of course, always a question for the jury to determine whether the way was so plain and so constantly used, with the acquiescence and consent of the owner, as to imply an invitation." The Court then pro-

ceeds to quote with approval the ruling in the case of *Chenery v. Railroad Co.*, 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575, which was as follows: "While long use by the public of a well-defined path across a railroad track does not, as a matter of law, impart a license, still it presents a question of fact for the jury, as to whether a license is to be implied, *which would subject the railroad to liability for negligence.*" (Italics added.)

The case just mentioned rules that the public may acquire the *right* to travel a pathway over a railroad company's right of way, when the user has been open, continuous, and adverse for 20 years, and that the railroad company cannot arbitrarily forbid the exercise of such right, unless the use of the pathway would materially interfere with the operation of the railroad and defeat the purpose for which the company was incorporated.

The testimony hereinbefore set out tends to prove that there was a compliance, on the part of the public, with every requirement of law necessary to confer upon the plaintiff the right to use the land for the purpose of travel. We contend that his use of the land was not dependent upon the presumption of a grant or a prescriptive right, but upon the fact that the privilege of a licensee is based upon a *legal right*, which, during the continuance of the license, entitles him to protection as effectual as if it was founded upon a grant or prescription.

"While a license operates only as an excuse for the act or acts licensed, and passes no interest in the land, it is effectual to justify everything done in accordance with its terms, prior to the revocation, and likewise any acts without which the acts licensed could not be done." 25 Cyc. 643.

There is no case in this State in which it has been decided that a licensee is not entitled to invoke the provisions of the sections hereinbefore mentioned. If a license does not confer a legal right upon the licensee to exercise the privilege therein mentioned, in accordance with its terms, then

we fail to discover wherein his position is more advantageous than that of a trespasser. But the case of *Matthews v. Railway*, 67 S. C. 499, 46 S. E. 335, 65 L. R. A. 286, and *Islar v. Railway*, 57 S. C. 332, 35 S. E. 583, both show that a licensee is entitled to ordinary care on the part of the railroad, and that, if the railroad is guilty of negligence towards a licensee, it thereby becomes liable to him for damages, whereas it owes no such duty to a trespasser. As a railroad owes to a licensee the duty of exercising due or ordinary care for his protection, no good reason can be assigned why he is not entitled to the protection afforded by the statutory provisions hereinbefore mentioned, especially as a railroad owes no higher duty to any person except a passenger entering upon a traveled place than it does to a licensee. (Its duty to a passenger is not involved in this case.)

Finally it is contended that there is a material difference between the right of the public to *cross* and the right to travel *along* a railroad track. Conceding that there is such difference, it naturally follows that, if the public may acquire the right to *cross*, there is a stronger reason why it should be allowed to travel along a railroad track, as there would be less danger, and the probability of interfering with the operation of the railroad would not be so great. But it would be unreasonable to suppose that the legislature contemplated so subtle a distinction. Furthermore, the testimony tended to show that the public used the defendant's right of way for walking *across* as well as *along* the railroad tracks.

There is another reason why the judgment of the Circuit Court should be affirmed. The testimony tended to show that the public used the so-called "railroad yard" or "railroad avenue" with the acquiescence or upon the invitation of the city of Charleston, in connection with, and incidental to, Addison's court, which was a public playground, and that the defendant railroad company recognized the fact



that it did not have the *exclusive* right of way over the land in question. The fact that there was a gate in the fence that divided Addison's court from the lot over which the railroad was operated tended to show an invitation to the public, not only on the part of the defendant, but of the municipality, to pass through the gate.

The right of the defendant to operate its railroad within the limits of the city was dependent upon the consent of the municipality, which had the power to attach such conditions as it might see fit, or even to refuse to allow the defendant to continue the operation of its road, whenever such action was demanded by the exigencies of the occasion, or to grant a right of way not exclusive in its nature, but to be exercised in connection with the right of the public to use the land as a street or traveled place. There was testimony also to the effect that the public exercised such right, for more than 20 years, openly, notoriously, and adversely to the rights of the defendant, as we have stated, by acquiescence or invitation of the municipality, in going to and coming from the said place of public amusement.

In the case of *Matthews v. Railway*, 67 S. C. 499, 46 S. E. 335, 65 L. R. A. 286, the Court says: "It should be observed the conclusion that the public cannot acquire a way on a railroad right of way, by prescription which is founded on the presumption of a deed, does not imply that title to portions of the right of way may not be acquired by adverse possession, which is founded on possession hostile to the true owner. Neither adverse possession nor the doctrine of equitable estoppel referred to in *Crocker v. Collins*, 37 S. C. 327 (15 S. E. 951, 34 Am. St. Rep. 752), is involved in this case." See, also, *Southern Ry. v. Beaudrot*, 63 S. C. 266, 41 S. E. 299.

The adverse user of the said land by the public, for more than 20 years, raised "the presumption of an antecedent exercise of the right of eminent domain by the public authorities." 37 Cyc. 37.

There is no question that the use of the said land was sufficient to make it a "traveled place," within the contemplation of the statute, unless, as contended, the user was without legal right on the part of the public. We have, however, shown that the adverse use of the land by the public for more than 20 years would raise the presumption that the municipal authorities, in the exercise of the power of eminent domain, had set apart the land for the use of the public, thus giving the public the legal right to use the land, in connection with its enjoyment by the railroad company.

For these reasons I dissent.

MR. JUSTICE WATTS concurs in the dissenting opinion.

8847

STATE v. NEWMAN ET AL.

(81 S. E. 667.)

REQUESTS TO CHARGE. APPEAL AND ERROR. EXCEPTIONS. HARMLESS ERROR.

1. An exception that the trial Judge failed to charge additional propositions of law, which were not requested, presents no error.
2. An exception to a charge, failing to show what the charge was, will not be considered.
3. In a prosecution for assault and battery with intent to kill, an exception to a charge on the law of mutual combat, not shown to have been prejudicial to the rights of defendants, was not ground for reversing a conviction.

Before SEASE, J., Chester, November, 1912. Affirmed.

Albert Newman and Elmore Mobley were indicted for an assault and battery with intent to kill, and being convicted of an assault and battery of a high and aggravated nature, appeal on the following exceptions:

"That his Honor, the presiding Judge, erred, it is respectfully submitted, in charging the jury as follows:

"(1) 'I charge you, as a matter of law, where two persons commit an offense, one standing by and seeing the other, aiding and abetting him, and being present aiding and abetting in the commission of the offense, the one who stands by thus aiding and abetting is as guilty as the one who actually commits the manual act. For example, if two persons waylay another in order to take his life, take that other's life, and one does the actual shooting or cutting, as the case may be, and the other stands by aiding and abetting, to give assistance, within the presence of the other, within range in order to give assistance, although he did not do anything as to pulling the trigger or cutting the person, he would be as guilty as the man who did the shooting or cutting. They would both be principals'—without also charging the jury in that connection the converse of the proposition: *i. e.*, that if the defendants were together, and one committed the alleged assault and battery without the concurrence, aid, and assistance of the other, that he alone would be responsible for the offense.

"(2) In not charging the true rule, as applicable to the case, that, where two defendants are on trial, charged with having together committed the same offense, if one did the act, and the other was present aiding and abetting in the common purpose, both would be responsible, for the act of one would be the act of both, provided the act was in pursuance of or incidental to the common purpose; but, if the act committed had no connection with the common object, or was committed by one defendant without the aid or concurrence of the other, the party who committed it would alone be responsible for the consequences, although the other was present when the unlawful act was committed.

"(3) That the Court was in error, it is respectfully submitted, in charging the jury the law relative to mutual combat, because there was absolutely no evidence in the case that

REP.]

November Term, 1918.

the parties had entered into any agreement to fight, and the same was misleading to the jury, and militated against defendants' plea of self-defense."

*Mr. W. H. Newbold*, for appellant, cites: 66 S. C. 3. *Charge on facts*: 36 S. C. 532; 27 Ala. 37; 4 Am. & Eng. Enc. of L. (1st ed.) 620; 67 S. C. 322.

*Mr. Solicitor Henry*, for respondent.

May 6, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

The defendants were indicted jointly for assault and battery with intent to kill, and were convicted of assault and battery of a high and aggravated nature. They appealed from the sentence of the Court, on exceptions which will be reported.

First exception. The only error assigned by this exception is that his Honor, the presiding Judge, failed to charge an additional proposition of law, which was not  
1 requested. It is not necessary to cite authorities to show that this exception cannot be sustained.

Second exception. This exception is also overruled, for the reason that there was not a request for his Honor, the Circuit Judge, to charge the proposition therein mentioned.

Third exception. In the first place, the exception fails to show what the Circuit Judge charged in regard to the law of mutual combat, but, waiving such objection, it has  
2, 3 not been made to appear that the charge was prejudicial to the rights of the defendants.

Appeal dismissed.

8855

JONES BROS. v. STRICKLAND *ET AL.*

(81 S. E. 792.)

## VENUE. CHANGE OF VENUE. RESIDENCE OF DEFENDANTS.

Code Civil Procedure, 1912, sec. 174, provides that, where there is more than one defendant, the action may be tried in the county in which one or more of the defendants reside at the time of the commencement thereof. Plaintiffs allege they sold a mule to defendant S., and took his note for the price, secured by a mortgage on the mule, and that thereafter S. sold the mule to B., both of whom were residents of B. county; that thereafter defendant V., as agent of the defendant bank, both being nonresidents, wrongfully took possession of the mule, and unlawfully detained him from plaintiffs. *Held*, that defendants, S. and B., were not mere nominal parties to the record, and that the action was therefore properly brought in B. county.

Before ERNEST GARY, J., Bamberg, July, 1913. Affirmed.

Action by Jones Bros. against J. R. Strickland and others for claim and delivery of personal property.

From an order denying the motion of the defendants, W. H. Varn and Bank of Smoaks, to change the venue to Colleton county, they appeal.

*Mr. J. W. Vincent*, for appellant, cites: *Answering no merits does not waive right to make motion*: 69 S. E. 603; 68 S. E. 631. *Jurisdiction at chambers*: 52 S. E. 646. *If no recovery against resident defendants case should be dismissed as to nonresidents*: 35 S. E. 604; 46 S. E. 105; 69 Ill. App. 215; 103 N. W. 115; 91 S. W. 483. *Test is whether the interests of resident defendants are adverse to those of plaintiff*: 77 N. W. 1080; 47 S. W. 482; 86 S. W. 75, 655; 130 N. W. 981; 61 S. E. 886; 97 Pac. 479. *Fraud on jurisdiction of Court to join nominal defendants*: 146 S. W. 1053; 3 Hill L. 297.

*Messrs. Mayfield & Free*, for respondents.

REP.]

November Term, 1918.

May 20, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

Plaintiffs brought this action in the Court of Common Pleas for Bamberg county. The defendants, Strickland and Benton, are residents of that county, and the defendants, Varn and the Bank of Smoaks, are residents of Colleton county. The plaintiffs allege that they sold a mule to Strickland, and took his note for the purchase price, secured by a mortgage of the mule; that thereafter Strickland sold the mule to Benton; that thereafter Varn, as agent of the Bank of Smoaks, wrongfully took possession of the mule, and unlawfully detains him from plaintiffs; that Strickland and Benton both claim an interest in the mule. The defendants, Varn and the Bank of Smoaks, moved for a change of venue to Colleton county. From an order refusing their motion, they appealed.

The motion was properly refused. Section 174 of the Code of Procedure provides that, when there is more than one defendant, the action may be tried in the county in which one or more of the defendants resides at the time of the commencement thereof. The Court cannot say that Strickland and Benton have no interest in the subject of the action, or that they are only nominal parties to the record, for the purpose of giving the Court of Bamberg jurisdiction of the action, and of the defendants who reside in Colleton county. Under the allegation that they claim an interest in the mule, they are proper parties to the action, and the venue was properly laid in the county of their residence.

Affirmed.

MR. JUSTICE GAGE did not sit in this case.

8761

## TURNER v. POOL ET AL.

(81 S. E. 156.)

## LIMITATION OF ACTIONS. RUNNING OF STATUTE. COMMENCEMENT.

Where defendant, who was in peaceable possession of land under a duly executed deed, knew that plaintiffs had by fraud obtained a second deed from her grantor to the same land, defendant's failure to have the second deed declared invalid will not start the running of limitations so long as no rights are asserted thereunder, for she is entitled to assume that none will ever be asserted, and, being in possession, is not injured by the existence of the deed.

Before BOWMAN, J., Anderson, May, 1913. Reversed.

Action by S. A. Turner and another against John Pool and others for recovery of an undivided interest in lands, and partition of the same. From an order sustaining a demurrer to the answer, the defendant, Pearson, appeals.

*Messrs. J. Robert Martin and John C. Henry*, for appellant. The former cites: *Plea of statute of limitations can not be raised by demurrer*: 22 S. C. 584; 16 S. C. 379; 80 S. C. 224; 70 S. C. 315; Code Civil Proc. 94, 118, 119. *Statute of limitations inapplicable to defense of fraud*: Code Civil Proc. 137, s. d. 6; 93 S. C. 405; 47 S. C. 133; 33 S. C. 28; 340 S. C. 153; 38 S. C. 500. *And to actions for recovery of real estate*: 33 S. C. 28; 34 S. C. 153. *Or foreclosure suits*: 38 S. C. 500. *Or actions for partition*: 93 S. C. 397. *Accrual of cause of action*: 33 S. C. 37; 18 S. C. 532; 7 Rich. Eq. 430. *The following cases explained*: 44 S. C. 378; 8 Rich. Eq. 130; 11 S. C. 333; 77 S. C. 541; 84 S. C. 256.

*Messrs. Oscar Hodges and H. P. Burbage*, for respondents. The latter cites: 84 S. C. 256; 77 S. C. 535; 44 S. C. 378; 33 S. C. 33; 38 S. C. 500; 47 S. C. 126. *Demurrer proper at any stage of case*: 5 S. C. 10; 11 S. C. 409; 12 S. C. 1; 13 S. C. 439; 17 S. C. 411; 50 S. C. 310 and 514.

REP.]

November Term, 1918.

March 21, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This is an appeal from an order of Judge Bowman sustaining a demurrer to the answer of Emily C. Pearson, appellant here, to a complaint brought by the respondents for the recovery and partition of certain real estate. The respondents claim as heirs at law, next of kin, and distributees of W. P. Turner, deceased, and allege that Susan Turner, the wife, by deed in her lifetime conveyed the land in dispute to him reserving in herself a lifetime support and the use of the premises; that W. P. Turner lived about four years after his wife, Susan, conveyed the land to him and died; that Susan after his death occupied, used, and enjoyed the premises and proceeds therefrom about 14 years, and died, and then the land under the deed of Susan, the wife, to W. P. Turner, the husband, descended to his heirs at law, etc. Emily C. Pearson alleges that she went into possession of the premises sued for under a deed from her sister, the said Susan Turner, made on January 2, 1902 (which is about nine years after the alleged deed from Susan Turner to her husband, W. P. Turner). She denies that Susan Turner ever executed the alleged deed to W. P. Turner as claimed, and alleges further that if any such deed was executed it was procured by fraud, duress, coercion, and misrepresentation, and that she was in possession and owner under her deed. The cause was referred, reference held, and report filed July 3, 1912. All parties excepted to the report. After reference had been held on April 24, 1913, the plaintiffs gave notice and demurred to the answer of Emily C. Pearson on the ground that it failed to state that the fraud, etc., had been discovered within the statutory period of six years. Upon the hearing on May 20, 1913, his Honor, Judge Bowman, sustained the demurrer, and Emily C. Pearson appeals and challenges the correctness of the order.



The sole question to be determined by this appeal is whether it was necessary for the defendant to allege in her answer that she had discovered the fraud, misrepresentation, and coercion on the part of W. P. Turner within six years prior to the commencement of the action. We think not. The defendant was in peaceable possession of property under a deed claiming it as her own and holding it adversely to the whole world. Even if she had notice that some one else was claiming to be the owner of the property and entitled to possession, she, being in possession, could sit still and was not required to go to the trouble and expense of going into Court to establish her title. Time enough for that when she was sued or called upon in a proper manner in a proper tribunal to assert her rights. Suppose she knew W. P. Turner had a deed and it was obtained by fraud, then she had every reason to assume that there would be no effort made to enforce a claim under a fraudulent deed. His Honor in deciding as he did overlooked the fact that this was not an action brought by a plaintiff to set aside and vacate a deed on the ground of fraud, but was an answer of a defendant in possession of land asserting that a pretended title under which plaintiffs claim was procured by fraud. Where a person is in possession of land rightfully claiming it as owner until proper legal steps are taken against him to oust him, he can remain quiet, even though he hears that others are claiming his property, and when sued can then interpose any legal defense he may have to defeat the cause of action as stated in the complaint. Under the decisions of this Court and the principles established in *Amaker v. New*, 33 S. C. 28, 11 S. E. 386, 8 L. R. A. 687; *McGee v. Jones*, 34 S. C. 153, 13 S. E. 326; *Jackson v. Plyler*, 38 S. C. 500, 17 S. E. 255, 37 Am. St. Rep. 782; *Goforth v. Goforth*, 47 S. C. 133, 25 S. E. 40; *Railway Co. v. Manufacturing Co.*, 93 S. C. 405, 76 S. E. 1091—the order appealed from is reversed.

Reversed.

8762

## STATE v. WILLIAMS.

(81 S. E. 154.)

## CRIMINAL LAW. APPEAL AND ERROR. LABOR CONTRACT. OBJECTIONS TO WARRANT.

1. The general rule that questions which were not raised in the trial Court will not be considered on appeal will not be applied in a criminal case tried before a magistrate, where the warrant charges no offense against the law, and there is a total failure of proof of any crime, not merely as to some immaterial particular or particulars, but in respect to matters which go to the foundation of the offense alleged, or attempted to be alleged, and proved.
2. Under Criminal Code 1912, sec. 492, providing that any person who shall contract with another to render personal services, and shall thereafter fraudulently or with malicious intent fail or refuse to render such service, shall be guilty of a misdemeanor, section 494, making the breach *prima facie* evidence that the violation was fraudulent and malicious, and section 497, providing that the contract may be verbal or in writing, and, if in writing, it shall be witnessed by one or more disinterested persons, and, if verbal, by at least two disinterested witnesses, not related by blood or marriage within the sixth degree to either party, where the warrant does not allege and the proof does not show whether the contract was verbal or in writing, or whether it was witnessed, a conviction cannot be predicated thereon.
3. Criminal Code 1912. sec. 84, providing that objections to any indictment for defects apparent on the face thereof must be taken by demurrer or motion to quash before the jury is sworn, does not apply to magistrate's Courts.

Before DEVORE, J., Greenville, December, 1913. Reversed.

Prosecution in magistrate's Court of Jim Williams, convicted of violating a labor contract. From an order of the Court of General Sessions affirming the judgment of the magistrate's Court, the defendant appeals.

*Mr. D. H. McGill*, for appellant, cites: *No proof that contract was witnessed as required by the statute*: Crim.

Code, 497; 32 S. C. 123; 61 S. C. 74; 66 S. C. 400; Black. Interpretation of Statutes, 213.

*Mr. Solicitor Cooper*, for respondent.

March 23, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

Section 492 of the Criminal Code provides that: "Any person who shall contract with another to render him personal service of any kind, and shall thereafter fraudulently, or with malicious intent to injure his employer, fail or refuse to render such service as agreed upon, shall be deemed guilty of a misdemeanor." Section 494 makes the breach of the contract by the employee, without sufficient cause, and to the injury of his employer, *prima facie* evidence that his violation thereof was fraudulent and with malicious intent to injure his employer. Section 497 provides that the contract may be verbal or in writing. If in writing, it shall be witnessed by one or more disinterested persons; if verbal, it must be witnessed by at least two disinterested witnesses, not related by blood or marriage within the sixth degree to either party. Other provisions of the statute, which are not pertinent, need not be mentioned.

The defendant was convicted, under this statute, in a magistrate's Court, on a warrant which, after stating the time and place, charged only that he "did enter into a contract with one A. B. Connelly by which he was to work for wages for said Connelly for the months of March, April, May, June, July, September, October, and November, for salary of \$12 per month; that, on the 22d day of May, 1913, he breached said contract contrary to form of the statute in such case made and provided."

The only testimony to support the charge was that of Connelly, the employer, which was as follows: "I employed this man, Jim Williams, to work for me during the months

of March, April, May, June, July, September, October, and November. I was to pay him \$12 per month. I was to pay him monthly. I have carried out my part of the said contract. On 22d May, I sent him to the field to cut some oats, and he left, and I have not seen him since, until this morning, June 4, 1913." Upon this testimony, defendant was convicted and sentenced. He was not represented by counsel at the trial. He afterwards employed counsel, who appealed on the following grounds: "(1) Because the affidavit and warrant fail to state facts constituting any offense known to the law, and especially the offense for which he was convicted; there being no allegation as to whether the contract was verbal or in writing, or whether it was witnessed as is required by law, and there was a total failure of proof that the defendant committed the offense for which he was convicted. (2) Because there was a total failure of proof that the alleged contract was witnessed as required by law, if verbal, by two disinterested witnesses not related by blood or marriage within the sixth degree to either party to said contract, and, if written, by one disinterested witness, and a total failure of proof that it was such a contract as could be enforced under the statute of frauds. (3) Because there is a total failure of proof that said contract was witnessed as either verbal or written contracts are required by statute to be witnessed, as well as a total failure of proof as to whether said contract was verbal or in writing."

The Circuit Court dismissed the appeal, for the following reason: "The record shows that not one of the grounds of appeal was passed on by the Court below, and that the magistrate was not called on or required to do so; he therefore made no ruling on either or any or all of them. That being so, I cannot say that he erred."

No doubt, the general rule is that questions which were not raised in the trial Court will not be considered on appeal. The rule is founded upon sound reason and policy. It has

often been applied and enforced by this Court, and, in  
1 purpose and effect, it is a most salutary rule in the  
administration of the law. But, like most rules, it is  
subject to some limitations and exceptions. It would be  
stretching it to an unwarranted length, especially in a criminal case, tried before a magistrate, to hold that a conviction must be sustained, where the warrant charged no offense against the law, and there is also a total failure of proof of any crime; the failure of proof not being merely as to some immaterial particular or particulars, but in respect of matters which go to the very foundation of the offense alleged, or attempted to be alleged, and proved, and therefore to the very heart of the judgment.

In this case, the warrant does not allege, nor does the testimony show, whether the contract was verbal or in writing, or whether it was witnessed, as required by the statute. If  
it was not so witnessed, whether verbal or in writing,

2 conviction cannot be predicated upon it. *State v. Williams*, 32 S. C. 123, 10 S. E. 876. These defects in the warrant and evidence are fatal to the judgment, and the Circuit Court should have ordered a new trial.

Nothing more need be said, except that section 84 of the Criminal Code, which provides that objections to any indictment for defects apparent on the face thereof must

3 be taken by demurrer or motion to quash, before the jury is sworn, does not apply to magistrates' Courts.

Reversed.

8763

## ANDERSON v. CITIZENS BANK.

(81 S. E. 158.)

## MORTGAGES. PLEDGES. PLEDGEE AS BONA FIDE PURCHASER. ASSIGNEE OF MORTGAGE.

1. In a suit to recover a bond and mortgage which plaintiff had assigned to a third person, evidence *held* to show that the defendant bank, which lent money on the security of the bond and mortgage, was a purchaser in good faith without notice of the agreement between plaintiff and her assignee.
2. Where the owner of a nonnegotiable bond and mortgage assigned it, the assignment being recorded, a *bona fide* purchaser without notice from the assignee is protected; the mortgagee being estopped to assert her rights.

Before SPAIN, J., Hampton, February, 1913. Affirmed.

Action by Anna R. Anderson against the Citizens Bank and another. From judgment for defendants, plaintiff appeals.

*Mr. J. W. Vincent*, for appellant, cites: *Form of decree*: 4 S. C. 292; 16 S. E. 140; Code Civil Proc. 327; 18 Mich. 75. *Assignee has no higher rights than assignor*: 38 S. C. 138; 17 S. E. 465; 26 S. C. 506; 2 S. E. 501; Code Civil Proc. 161; 95 Fed. 55; 53 N. E. 868; 65 S. E. 81; 56 S. E. 676; 76 S. E. 163; 47 S. E. 71; 68 S. C. 246.

*Messrs. Warren & Warren*, for respondents.

March 24, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

This was an action brought by the plaintiff against the Citizens Bank to recover from it a certain bond and mortgage executed and delivered by J. T. Yarley over real estate to the plaintiff, which, after execution and delivery to her, was by her assigned and delivered to the Hampton County News, and by it duly assigned and delivered to the Citizens

Bank to secure a loan made by Citizens Bank to Hampton County News. The plaintiff alleges that the Hampton County News Company, a corporation engaged in printing and publishing a newspaper, in 1911, was in need of funds, and attempted to negotiate a loan of \$800 from the Citizens Bank, and offered as security therefor a chattel mortgage over its plant, covering all of its property. This was declined by the bank, and the business manager of the Hampton County News Company induced the plaintiff to assign to the news company the bond and mortgage, she was the owner and holder of, against Yarley. She assigned the same to the news company, and the news company assigned and delivered it to the bank and the bank advanced \$800 to the news company, and took also a chattel mortgage on its plant. She alleges that the assignment by her to the news company was without consideration, and made solely to assist and accommodate the news company in procuring a loan from the bank. She alleges that, at the time the bank obtained from the news company the bond and mortgage in question, it knew that the assignment by her to the news company was made solely as an accommodation to the news company. Yarley answers that he owes the bond and mortgage in question, and asks that he be allowed to pay into Court the amount due thereon, to be paid out to whoever is entitled to the same. The bank, by its answer duly filed in the case, denies all of the material allegations of the complaint, and alleges that the bond and mortgage in question came into its possession in due course of business, without any notice whatsoever of any claim or interest of any one therein, except the holder thereof, the news company, duly assigned to it by the plaintiff, and that the assignment was on record in register of mesne conveyance for Hampton county, and it denies that plaintiff has any title or interest in the bond and mortgage, and that the same was absolutely assigned by the news company to it (the defendant). At the time of such assignment the news company was the

owner of the bond and mortgage. The cause was referred to J. W. Manuel, Esq., to hear and determine all issues of law and fact, and report the same to the Court. By his report he found according to the contention of plaintiff; upon exceptions to this report, the cause was heard by Judge Spain, and exceptions sustained, and findings of referee in favor of plaintiff were reversed, and decree filed in favor of defendant. From this decree, plaintiff appeals.

The first and second exceptions impute error on the part of his Honor in not finding and stating what facts he found and based his decree on. These exceptions are overruled, as an inspection of the decree shows for itself what exceptions to the referee's report were overruled or sustained, and the findings and decree are plain and unambiguous, and there is no doubt as to what his Honor meant or the effect of his decree.

The other exceptions allege error on the part of his Honor in his findings of fact, and complain of the decree that he made. If his Honor's findings of fact are sustained, then his decree simply carries out the law applicable to his 1, 2 findings of fact. It is incumbent on the appellant to satisfy this Court that the findings of fact were erroneous. Has the appellant done so? The only question of fact to be determined, and which is the pivotal point in this case, is: Did the bank, when it received the Yarley bond and mortgage, have any knowledge or notice, either actual or constructive, of what took place between the plaintiff and Bishop, the business manager of the news company, as to the accommodation character of the assignment of the bond and mortgage by her to the news company? The assignment was made on the 23d day of March, 1911, by the plaintiff, was regular in form, and was not only signed and witnessed, but was duly probated and recorded in register's office. Here we have the news company in possession of the bond and mortgage duly assigned to it, and nothing to show, from an inspection, that any one else was interested in it other than



the holder thereof, the news company, and on March 28, 1911, five days thereafter, it was duly and legally transferred to the bank for value, and we have the testimony of Talley, the cashier of the bank, and who arranged the loan and advanced the money, that he had no notice whatsoever, of any kind, that the bond, mortgage, and assignment were anything other than what it purported to be, to wit, that the news company was owner and holder thereof. It does not make any difference what the understanding was between the plaintiff and the news company, unless notice of that agreement was brought home to the bank, and we agree with his Honor that the bank, its officers, agents, and servants had no such notice, it cannot affect the bank. We think that the evidence conclusively shows that the bank was an innocent *bona fide* purchaser for value without notice of the bond and mortgage, and when the plaintiff parted with her possession of the bond and mortgage, and regularly assigned the same to the news company and put it in the power of the news company to negotiate it as its property, and obtain from the innocent and unwary money upon the faith of it being the property of the news company, then she is estopped, as far as the bank is concerned, in claiming any interest in it. There is nothing in the evidence to have put the defendant on notice and required it to make inquiry. If instruments are not negotiable, a *bona fide* vendee for valuable consideration without notice will be protected. *State Bank v. Cox Co.*, 11 Rich. Eq. 344, 78 Am. Dec. 458; *Frascr & Dill v. Charleston*, 11 S. C. 486.

We concur in the findings of facts of the Circuit Judge, and the appellant has failed to convince us that his Honor was in error in any of the particulars complained of in the exceptions.

All exceptions are overruled, and the judgment of Circuit Court affirmed.

MR. JUSTICE GAGE did not sit in this case.

8764

## MIDDLETON v. DENMARK ICE AND FUEL CO.

(81 S. E. 157.)

## JUDGMENT. MODIFICATION BY ANOTHER JUDGE. POWERS AT CHAMBERS.

1. The judgment of a Judge presiding in a county from which no appeal is taken may not be reviewed, modified, or reversed, by the resident Judge of the Circuit of which the county was a part.
2. A Judge has no power at chambers, without the consent of all the parties, to correct the judgment of a Court (Civil Code 1912, sec. 3833).

Before RICE, J., Bamberg, at chambers, August, 1913.  
Reversed.

Action by A. G. Middleton against the Denmark Ice & Fuel Co. From an order modifying judgment rendered by preceding Judge during preceding term of Court, plaintiff appeals.

*Mr. J. Wesley Crum, for appellant, cites: Order of preceding Judge resjudicata: 23 Cyc. 1215 and 1233; 17 S. C. 35; 34 S. C. 463; 45 S. C. 321; 51 S. C. 25; 52 S. C. 166; 50 S. C. 68; 55 S. C. 507; 63 S. C. 406; 84 S. C. 193; 87 S. C. 127; 21 S. C. 89. Order of preceding Judge could be reviewed only on appeal: 47 S. C. 525; 51 S. C. 1; 5 S. C. 348; 49 S. C. 156; 54 S. C. 4. Or on motion in Court to correct judgment: 34 S. C. 452; 51 S. C. 333; 35 S. C. 612; 46 S. C. 474. Circuit Judge at chambers cannot correct judgment of a Court: 1 Code of Laws 3833; 47 S. C. 31; 3 S. C. 427; 44 S. C. 383; 52 S. C. 305; 85 S. C. 530; 30 S. C. 614; 14 S. C. 517; 5 S. C. 348; 54 S. C. 400; Coley v. Coley, Mss. 84 S. C. 383, explained.*

*Mr. J. W. Vincent, for respondent.*

March 24, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This appeal is by Citizens Exchange Bank in the above entitled cause. The Citizens Exchange Bank filed a claim with the receivers of the Denmark Ice & Fuel Company for \$3,765, with interest at the rate of 8 per cent. per annum, payable annually, and 10 per cent. of that amount as attorney's fees. The claim was for money loaned, and was secured by a mortgage of the company's property, which provided for the interest and the attorney's fees claimed. The cause was referred to the master to hear and determine all issues of law and fact and report the same to the Court. Master made his report to the Court, and found that the Citizens Exchange Bank had the first lien after what was due for taxes, over all the property of the Denmark Ice & Fuel Company for \$3,765, with interest from the date of the mortgage at the rate of 8 per cent. per annum, payable annually, and 10 per cent. on that amount as attorney's fees. No exceptions were taken by any one to the master's report. Subsequently, on July 8, 1913, his Honor, Judge Ernest Gary, filed his decree confirming and approving the report of the master. To the decree of Judge Gary no notice of appeal was given, nor any exceptions taken. The decree of Judge Gary was filed during term time, while he was presiding in Bamberg. Subsequently, without appealing to the Supreme Court, one of the receivers of the Denmark Ice & Fuel Company, after notice, obtained from Judge Rice at Aiken, S. C., on August 9, 1913, an order modifying the decree of Judge Gary, and reducing the fee allowed the attorney for Citizens Exchange Bank to \$150, from this order Citizens Exchange Bank appeals, and by five exceptions challenges the correctness of Judge Rice's ruling. It is unnecessary to consider these exceptions separately. The exceptions must be sustained. When the decree of Judge Gary was filed, any party to the action who felt aggrieved should have appealed from the decree, and, failing to do so, the cause becomes *res adjudicata*, on the ground

REP.]

November Term, 1918.

that they are concluded by acquiescence in the decree of his Honor, Judge Gary, by failure to appeal therefrom.

His Honor, Judge Rice, had neither power nor authority to review, reverse, or modify the decree of Judge Gary, who had passed the same while presiding in Bamberg county, even though he was the resident Judge of the Circuit of which the county of Bamberg is a part. He committed an error in his attempt to interfere with Judge Gary's decree. If there was any error in the judgment and decree of Judge Gary, there is, under the Constitution and laws of this State, another tribunal for the correction of the same. This doctrine has been announced in a number of cases, among which are: *Hughes v. Shingle Co.*, 51 S. C. 25, 28 S. E. 2; *Wilmington v. R. Co.*, 52 S. C. 175, 29 S. E. 629; *Wylie v. Bank*, 63 S. C. 419, 41 S. E. 504; *Woodman v. Means*, 87 S. C. 127, 69 S. E. 85.

Judge Rice had no power or jurisdiction at chambers, without the consent of all parties, to correct the judgment of a Court. Code of Laws, S. C., 1912, sec. 3833; 2 *Bank v. Mellett*, 44 S. C. 286, 22 S. E. 444; *Turner v. Foreman*, 47 S. C. 33, 24 S. E. 989; *Badham v. Brabham*, 54 S. C. 404, 32 S. E. 444; *A. C. L. R. R. Co. v. Moise*, 85 S. C. 530, 67 S. E. 785.

Reversed.

MR. JUSTICE GAGE did not sit in this case.

8765

## CORLEY v. AMERICAN BAPTIST HOME MISSION SOCIETY.

(81 S. E. 146.)

## LANDOWNER. INJURY TO THIRD PARTY ON PREMISES. COLLEGES. TORTS OF STUDENTS.

1. Where a home mission society, engaged in collecting funds for educational purposes, allowed a college to use its land free of charge, and supplied the fund for the payment of its teachers, but took no part in the active management of the college, it was not liable for an injury to a third party caused by his running into a wire fence negligently placed across a path used by the public by the students of the college.
2. A college was not liable for an injury to a third party caused by its students in connection with the game of baseball; the game not being under college control, or part of the college athletics.

Before SEASE, J., Columbia, March, 1913. Reversed.

Action by Henry S. Corley against American Baptist Home Mission Society. From a judgment for plaintiff, defendant appeals. The facts are stated in the opinion.

The following exceptions were taken in the case:

"(1) That his Honor erred, for the reason therein stated, in refusing the direction of a verdict in favor of the defendant, upon the first ground of the motion made by defendant, which ground was as follows, to wit: 'That there is no evidence in this cause tending to establish that the public had acquired the right to travel along the pathway from the gate at the foot of Blanding street to the gate on Taylor street, at the foot of Pine street, and, there being evidence that Benedict College, the occupant of the premises in question, had objected to the use of the path in question, and had put up signs warning the public that it was no thoroughfare, but private grounds, the plaintiff can only be considered to have been a trespasser, and that there is no evidence that the defendant, the American Baptist Home Mission Society, or any of its authorized agents, knew of the putting up of the

wire which caused the injury, the jury must find for the defendant.'

"(2) That his Honor erred, for the reason therein stated, in refusing the direction of a verdict in favor of the defendant, upon the second ground of the motion made by defendant, which ground was as follows, to wit: 'That, it appearing, by the uncontradicted testimony, that the wire was put up by the students of Benedict College for their own purposes, without the authority, consent, or knowledge of any agent of the defendant, the American Baptist Home Mission Society, the defendant is not responsible for the injuries resulting from the putting up of the wire, and the jury must find for the defendant.'

"(3) That his Honor erred, for the reason therein stated; in refusing the direction of a verdict in favor of the defendant, upon the third ground of its motion, which ground was as follows, to wit: 'It appearing, by the record of the deed of conveyance offered in evidence by the plaintiff, that, even if the legal title to the premises in question may still be in the defendant, the American Baptist Home Mission Society, it, since the incorporation of Benedict College under the laws of the State of South Carolina, holds such legal title as trustee only for Benedict College, and Benedict College, being in possession of the premises and in the enjoyment thereof for the purposes of the original trust, the defendant, the American Baptist Home Mission Society, is in nowise responsible for the use of the said premises, and the jury must find for the defendant.'

"(4) That his Honor erred, for the reason therein stated, in refusing the direction of a verdict in favor of the defendant, upon the fourth ground of its motion, which ground was as follows, to wit: 'Because it appears from the uncontradicted testimony in the case, by that offered on behalf of the plaintiff, as well as by that for the defendant, that the defendant, the American Baptist Home Mission Society, is an eleemosynary corporation, organized and existing for

charitable purposes only, and that it is supported entirely by voluntary donations for charitable purposes, it cannot be held responsible for the injuries alleged in the complaint in this action.'

"(5) Because his Honor erred in refusing defendant's first request to charge, as follows, to wit: 'There being no evidence in this case to connect the defendant, the American Baptist Home Mission Society, with the acts alleged in the complaint as having caused the alleged injury to the plaintiff, the jury must find a verdict for the defendant.'

"The error being that there was no evidence to show that the defendant, its servants or agents, were in anywise connected with the delict complained of in the complaint, and no reasonable inference could be drawn from any of the testimony that the defendant, American Baptist Home Mission Society, its agent or servants, placed the wire across the path, or acquiesced or consented to its being placed across the path."

*Messrs. Lyles & Lyles*, for appellant, cite: *Duty toward persons using a private way*: 1 L. R. A. 459; 100 Ind. 221; 1 McCrary 438; 92 S. C. 291. *Prescription*: 63 S. C. 439. *Trespasser*: 92 S. C. 291; 86 S. C. 110. *Lack of evidence to sustain judgment*: 81 S. C. 31. *Mere conjecture as against positive denials*: 91 S. C. 305. *Liability of charitable corporations for torts*: 6 Cyc. 975-6; 218 Ill. 381; 2 L. R. A. (N. S.) 556; 105 Fed. 886; 7 L. R. A. (N. S.) 485, 481; 120 Mass. 432; 11 L. R. A. (N. S.) 1179; 136 Am. St. Rep. 879; 39 L. R. A. (N. S.) 427; 67 S. E. 971; 120 Pa. St. 624; 6 Am. St. Rep. 745; 121 Pac. 901

*Messrs. Porter A. McMaster and W. H. Townsend*, for respondent, cite: *Public right to use path*: 161 Fed. 376; 72 Miss. 200; 16 So. 213; 48 Am. St. Rep. 547; 26 L. R. A. 686; 62 Kan. 188; 61 Pac. 689. *Negligence of landowner in permitting obstruction on path across his property*: 62

REP.]

November Term, 1918.

Kan. 188; 68 N. Y. 283, 292; 23 Am. Rep. 175; 161 Fed. 376; 72 Miss. 200; 204 N. Y. 248 to 253; 28 Am. & Eng. Ann. Cases 748. *Liability of charitable corporations for injuries to third parties*: 199 N. Y. 233; 92 N. E. 626; 139 Am. St. Rep. 889; 32 L. R. A. (N. S.) 68; 203 N. Y. 193; 96 N. E. 406; 26 Am. & Eng. Ann. Cases (1913A.) 884; 147 Mich. 255; 11 A. & E. Ann. Cases 159. *Title to land in defendant as trustee for college*: 29 S. C. 135. *Landowner liable for acts of occupant of land as its agent to carry out trusts undertaken by it*: 130 Ky. 153; 17 A. & E. Ann. Cases 786; 67 N. J. L. 610.

March 24, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

This is an action against the appellant, American Baptist Home Mission Society, for damages.

It appears that the appellant owns a lot of land which it holds for educational purposes; that it allows the Benedict College, a corporation, to use the land to conduct a college; that the appellant is engaged in collecting and distributing funds for educational purposes. There is no evidence that the appellant is engaged in the active management of educational institutions. There is evidence it did elect a president of the Benedict Institute, but that its president and officers now in office were elected by the trustees of Benedict College. There was evidence that there was a pathway across the grounds that had been used for more than 20 years by the public; that the students of the college, under the management of a teacher, in preparation for a game of baseball, stretched a wire across this pathway for the convenience of the game, and left it there, and the respondent ran into it, and was injured by running into it. Negligence was alleged in placing the wire across the path, and leaving it there. At the close of the evidence the appellant moved for a direction of a verdict in its favor, which was refused, and also asked



the presiding Judge to charge the jury that there was no evidence upon which it could find a verdict for the plaintiff. This was also refused. The jury found a verdict for the plaintiff, and, from the judgment entered thereon, this appeal is taken.

There are several questions in the case (the exceptions will be reported); but only one need be considered. Was there any evidence of negligence on the part of the appellant? There was none. The appellant did not elect the officers or teachers. It took no part in the management of the college, and does not hold itself out as doing so. It owns the land, and supplies the fund for payment of teachers, but is no more responsible for negligence in the management than any landlord would be for the negligence of his tenant. It can make no difference that no rent is charged, or that the landlord may supply his tenant with food or raiment. There was some conflict of testimony as to whether Leak, the manager of the baseball, was or was not a teacher. It is immaterial here whether he was or was not a teacher. There was nothing to show that the game was under college control, or a part of the college athletics. It certainly cannot be successfully contended that a college is responsible for the unofficial acts of its students, or even of its professors. Respondent says that Benedict College is a subsidiary corporation to appellant. This may be true; but there is no evidence of it.

It having been held that there is no evidence of negligence for which the appellant is responsible, the other questions do not arise.

The judgment of this Court is, that the judgment appealed from is reversed.

8767

## TALBERT v. CHARLESTON &amp; W. C. RY. CO.

(81 S. E. 182.)

## CARRIERS AND PASSENGERS. ACCOMMODATIONS ON TRAINS. PERSONAL INJURY. PROXIMATE CAUSE. CONTRIBUTORY NEGLIGENCE.

1. A carrier under its contract of carriage is bound to furnish passengers with seats, and if the failure to do so is under circumstances showing that the carrier had every reason to know that the accommodations were insufficient, and due to wilful and reckless indifference to the rights of the passengers, a recovery of punitive damages can be had.
2. Where a passenger, while standing upon the bottom step of a passenger coach and swinging out beyond the line of the cars and looking backwards through curiosity, was injured by being struck by a car standing upon a sidetrack, the proximate cause of the injury was not any negligence of the carrier in failing to furnish seats, but his own contributory negligence.
3. Where a boy 19 years old left the inside of a passenger coach, where he had standing room, and went out on the platform, and was injured while swinging out from the lower step by being struck by a car standing on a sidetrack, he was guilty of contributory negligence precluding recovery.
4. Though the negligence of a carrier in failing to provide seats inside a passenger car compelled a passenger to stand upon the platform, yet where the passenger placed himself in a position of obviously greater danger by going to the lower step, swinging out and looking backwards, and was struck by a car standing upon a sidetrack, he could not recover.

Before SHIPP, J., Edgefield, October, 1912. Affirmed.

Action by John Wilbur Talbert, by guardian *ad litem*, Beatrice Talbert, against the Charleston & Western Carolina Railroad Company. From a judgment for defendant, plaintiff appeals.

*Messrs. Thurmond & Nicholson*, for appellant, cite: *The Georgia law which governs case declared in*: 53 S. E. 575; 48 S. E. 681; 17 Wis. 487; 84 Am. Dec. 758; 36 N. Y. Supp. 378. *Unless danger is obviously great Court cannot hold that a given act precludes recovery*: 64 S. E. 297; 56 S. E. 750; 47 S. E. 570. *Duty toward passenger*: 60 S. E.

278; 44 S. E. 1005; 92 Ga. 388. *Doctrine of comparative negligence*: 39 S. E. 308; Georgia Code, sec. 2781; 51 S. E. 343; 13 S. E. 105; 48 S. E. 149; 74 S. E. 778. *Anticipation of another's negligence*: 16 S. E. 958; 31 S. E. 90; 30 S. E. 565. *Presumptions against carrier*: Georgia Code, sec. 2780; 66 S. E. 947; 95 Ga. 738; 22 S. E. 660. *The South Carolina practice applies to motion for nonsuit here*: 91 S. C. 445; 66 S. C. 482.

*Mr. F. B. Grier*, for respondent, cites: *Passenger's injury was due to his being out of his place*: 138 Ga. 32; 74 S. E. 778; 85 Ga. 507; 11 S. E. 832; 130 Ga. 455; 60 S. E. 1045; 76 Ga. 333; 124 Ga. 246; 52 S. E. 651; 82 Ga. 653; 11 S. E. 872. *Passengers out of place in railroad yards*: 7 Ga. App. 344; 66 S. E. 1030; 112 Ga. 668; 37 S. E. 861; 6 Ga. App. 456; 65 S. E. 313; 11 Ga. App. 313; 75 S. E. 572; 4 Elliott R. R., pars. 1630-1633. *Passenger leaning from car and striking obstruction cannot recover*: 85 Ga. 653; 11 S. E. 872; 120 Ga. 225; 47 S. E. 570; 114 Ga. 896-897; 41 S. E. 46; 90 Ga. 819; 22 S. E. 841; 130 Ga. 455; 60 S. E. 1045; 133 Ga. 525; 66 S. E. 269; 4 Ga. App. 354; 61 S. E. 511; 138 Ga. 32; 74 S. E. 778; 130 Ga. 779; 61 S. E. 826; 124 Ga. 243; 52 S. E. 651; 128 Ga. 478; 57 S. E. 877; 108 Ga. 304; 32 S. E. 880; 122 Ga. 368; 50 S. E. 121; 122 Ga. 266; 50 S. E. 99. *Present action duplicated by*: 86 Minn. 224; 90 N. W. 360; 57 L. R. A. 639; see also, 73 N. E. 552; 166 Mass. 220; 44 N. E. 126; 61 S. E. 901. *In Georgia a carrier is not an insurer of passengers*: Ga. Code, pars. 2714 & 2729; 117 Ga. 923; 43 S. E. 990; 38 Ga. 409; 121 Ga. 27; 48 S. E. 681; 110 Ga. 681; 36 S. E. 209; 123 Ga. 90; 50 S. E. 92; 110 Ga. 121; 35 S. E. 283; 119 Ga. 523; 46 S. E. 655; 5 Ga. App. 219; 62 S. E. 1020; 95 Ga. 736; 22 S. E. 658; 113 Ga. 1021; 39 S. E. 427; 138 Ga. 32; 74 S. E. 778; 50 Ga. 353; Hutch. Carriers (3d ed.), sec. 1198; 1 Ga. App. 491; 85 Ga. 507; 11 S. E. 832. *In Georgia, obvious dangers close to track that can be seen must be seen and*

REP.]

November Term, 1918.

*avoided*: Ga. Code, sec. 4426; 88 Ga. 210; 14 S. E. 199; 112 Ga. 762; 38 S. E. 790; 92 Ga. 723; 18 S. E. 976; 6 Ga. App. 462; 65 S. E. 297; 96 Ga. 819; 23 S. E. 841; 114 Ga. 895; 41 S. E. 46; 103 Ga. 570; 29 S. E. 927. *Passengers taking chances of obvious risk*: 124 Ga. 243; 52 S. E. 651; 108 Ga. 304; 32 S. E. 880; 130 Ga. 779; 61 S. E. 823; 128 Ga. 478; 57 S. E. 877; 120 Ga. 225; 47 S. E. 570; 76 Ga. 333; 122 Ga. 266; 50 S. E. 99; 135 Ga. 12-16; 68 S. E. 789; 4 Ga. App. 454; 61 S. E. 511; 130 Ga. 455; 133 Ga. 525; 66 S. E. 269; 131 Ga. 157; 62 S. E. 64; 136 Ga. 873; 72 S. E. 403; 122 Ga. 368; 81 Ga. 476; 122 Ga. 266; 10 Ga. App. 180-181; 73 S. E. 25; 11 Ga. App. 121; 74 S. E. 854; 78 Ga. 694-5; 3 S. E. 397; 101 Ga. 400; 29 S. E. 304. *Negligence alleged was not proximate cause of plaintiff's injury*: 67 S. C. 291; 38 S. C. 282; 58 S. C. 491; 81 S. C. 100; 80 S. C. 1; 86 S. C. 69; 75 S. C. 375; 120 Ga. 225.

March 25, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This case was tried before Judge Shipp at the October term of the Court for Edgefield county, 1912, and was a complaint by plaintiff against the defendant for alleged personal injuries sustained by him while traveling as a

1, 4 passenger on the defendant's train from McCormick to Augusta, Ga., during a fair in Augusta. The alleged injury occurred in Augusta, Ga., and the case was tried under the laws of the State of Georgia. After the plaintiff had closed his testimony, the defendant made a motion for nonsuit, which at that time was refused, but after the defendant offered part of its testimony the nonsuit was granted. Plaintiff appeals.

The grounds of appeal, five in number, impute error on the part of his Honor in granting nonsuit; the contention of the plaintiff being that the plaintiff's conduct, on the occasion of his injury, was not negligence *per se*, and involved

questions of fact, under all of the circumstances, that should have been submitted to the jury for determination. Let us see what the undisputed and uncontradicted facts show. The evidence shows that on November 9, 1911, the plaintiff, who was 19 years old, purchased a ticket and return from McCormick, S. C., to Augusta, Ga.; that he boarded the defendant's train at McCormick, S. C., and took a seat in passenger coach with Jaro and remained in that seat until he got to Clark's Hill, when he left the same to get a drink of water; that the train was crowded with passengers at that time going to the fair, and, after Talbert vacated his seat to get a drink of water, some one took it. Talbert remained standing in the aisle in the forward end of the coach near the stove. There was standing room for him in the coach, though it was crowded, but Talbert says that it was more comfortable outside, and for this reason he rode part of the way on the outside on the platform of the coach and held onto the door at times, and when conductor opened the door held onto the railing. After the train left Sibley Mills and was slacking up to stop, Talbert went from the platform down on the steps of the car and leaned out beyond the line of the coach looking backwards. He testifies his purpose was to ascertain if the train had left Sibley Mills; that he had been to Augusta before and knew the location. It was within the company's yard in the city of Augusta. It is alleged in the complaint that his head was from six to ten inches beyond the line of the coach. In his testimony he states that he was standing on the steps leaning out beyond the line of the coach looking backwards, when his head struck against a car, which was standing on the sidetrack, which train was then passing. One of plaintiff's witnesses testified that he saw plaintiff on the ground just after the injury, and that there was sufficient room between the freight car and passenger car on the main line for him to stand, and says: "I believe I could have stood very safely. There was clearance room for the cars to pass." No one

measured the distance between the cars, but it is clearly established that there was sufficient room for safe clearance. There was testimony that there was room in the smoker, and in there no one was required to stand. Other passengers were standing on the platform with plaintiff, and no one was hurt except Talbert, and at the time of his injury he was on the lower step, leaning out, looking backwards, with his head beyond the line of the car.

While it is the law and it was the duty of the defendant, the carrier, to furnish the passengers with seats, and a failure to do so would furnish the passengers a suit for damages for breach of contract, and a failure on the part of the carrier to furnish seats for passengers, under circumstances which show the carrier had every reason to know that the accommodations furnished were not sufficient, will furnish ground enough to sustain an action for punitive damages, if the failure is due to wanton, wilful, or reckless indifference to the rights of passengers (*Cave v. Seaboard Air Line Ry.*, 94 S. C. 282, 77 S. E. 1017), yet this failure on the part of the defendant, if there was a failure and negligence on its part in this particular, in nowise contributed as a direct and proximate cause to plaintiff's injury, for the evidence shows that he could have been safe, even though if made uncomfortable by remaining standing in the car, or even on the platform; but the evidence shows that he left a safe place and descended to the lowest step, not being invited to do so, and no call for a station, and no invitation to alight. Even then he would have been safe if he had not negligently leaned out with his head beyond the line of the car looking backwards. This negligence on his part was the sole and direct and proximate cause of his injury. No other reasonable inference can be drawn from the evidence but that the injury to the plaintiff was due to his own contributory negligence. He left the coach provided for passengers; had he remained there, he would have been safe. He went on the platform; had he remained there, he would have

been safe. He descended the steps and stood on the lowest step in the company's yard; had he even then exercised due care and precaution, he would not have been injured, but he poked his head out beyond the line of the cars and looked backwards instead of forward, and was injured. His whole action was careless and negligent, and showed a total absence of care and precaution on his part. Where one voluntarily places himself in a position of obviously greater peril or one known to be more dangerous, and in consequence thereof is injured, even though by negligence of the company, if it appears that such act of employee or passenger was one approximately contributing to his injury, and without which the same would not have occurred, such act must be held an act of contributory negligence, which would defeat any right of recovery. *Bouchillon v. Railway Co.*, 90 S. C. 42, 72 S. E. 634, Ann. Cas. 1913D, 1. But it was urged by the appellant that this case was tried under the Georgia law, and his Honor overlooked and disregarded the law of comparative negligence. There is nothing in the evidence that shows that any negligence on the part of the defendant in any manner contributed as a proximate cause to plaintiff's injury, but the testimony shows that the plaintiff's own carelessness and negligence was the sole cause of his injury. Had he remained in the place provided for him, he would have been safe, even though, according to his evidence, crowded and uncomfortable. According to the law of Georgia, the railroads have the exclusive use of their switch yards, and the public are warned to keep out of them, and it is not to be expected that passengers or others, other than the employees, who have a right there in the course of their employment, will venture out of the passenger cars into the railroad yard in use for making up and shifting their trains, and not for the purpose of receiving and discharging passengers. *Waldrep v. Georgia R. R.*, 7 Ga. App. 342, 66 S. E. 1030; *Grady v. Georgia R. R.*, 112 Ga. 668, 37 S. E. 861; *Georgia R. R. v.*

*Fuller*, 6 Ga. App. 456, 65 S. E. 313; *Williams v. Southern Ry.*, 11 Ga. App. 313, 75 S. E. 572.

"A passenger riding on the steps of the platform of the car and swinging out is negligent and cannot recover for injuries received." 4 Elliott on R. R., pars. 1630-1663.

The rule of law as declared by the Georgia Courts is that a passenger on the steps of the platform of the car, who leans out and allows, as it were, his center of gravity to go beyond the line of the car from the platform steps, so that if he discovered an obstruction in the way he cannot recover himself, but falls off and is injured, he cannot recover. *Paterson v. Central R. R.*, 85 Ga. 653, 11 S. E. 872; *Lindsay v. Southern Ry.*, 114 Ga. 896, 41 S. E. 46; *Simmons v. S. A. L.*, 120 Ga. 225, 47 S. E. 570, 1 Ann. Cas. 777; *Johns v. R. R.*, 133 Ga. 525, 66 S. E. 269; *Southern Ry. v. Nappier*, 138 Ga. 32, 74 S. E. 778.

It is said in *Benedict v. Minneapolis & St. Louis R.*, 86 Minn. 224, 90 N. W. 360, 57 L. R. A. 639, 91 Am. St. Rep. 345: "While it is the absolute duty of a railway carrier of passengers to provide a safe and secure place for its patrons to ride within its cars, when such duty is performed the passenger has no right to voluntarily extend his person beyond the line of the moving car, or ride upon its platform; and if he does so, and injury follows, no recovery can be had therefor. Where a carrier of passengers by steam permits its car to be overcrowded, and required its passengers to ride on the platform, it cannot excuse itself for injuries from such cause; but if a passenger, while riding on the platform, negligently extends his person beyond the car line from curiosity, his act in that respect must be regarded as negligent." In the same case the Court further says: "The high degree of duty to patrons exacted of carriers of passengers has been generally regarded as fulfilled with reference to the outside arrangements at such places, where a safe and secure place has been provided within its cars for their occupation. Hav-



ing done this, the carrier is not required, in maintaining adjoining structures, to guard against the anticipated carelessness of those who are in no danger so long as they remain in the place of safety which the carrier has furnished. The customary method of constructing tracks, building bridges, and running trains in railroad yards render any exposure of a person beyond the car line imminently hazardous; hence there must arise a presumption in behalf of the carrier, when injury arises from such exposure, that the conduct of its business in this respect is not negligent, and imposes upon the injured party the burden of showing that it was otherwise in any particular case."

In *Georgia, Southern & Florida Railroad v. Murray*, 113 Ga. 1021, 39 S. E. 427, the Court says: "It was proved that the point at which the plaintiff attempted to alight was more than one yard from what was known by the defendant and its employees as 'the junction' where she had asked to be let 'off;' and that the stopping of the train was only momentary, to allow time for the switch to be set. It was plainly her duty to wait, before attempting to get off, until the train reached the point where she had asked to be discharged, or at least until it reached one of the regular places for discharging passengers. Failing in this, she must be held to have assumed the risk of whatever accident befell her. The railroad company certainly cannot be held responsible for the results of her attempts to alight from the train at a point short of her destination and distant from any station or stopping place, nor can it be justly held that a momentary stopping of the train for switching purposes was an invitation to her to alight, such as would excuse her negligence. No act of negligence on the part of any of the agents or employees of the defendant company is disclosed by the record. The conductor had no notice that the plaintiff would attempt to alight before reaching the junction, nor was he chargeable with such notice. Taking all together, the evidence demanded the conclusion that whatever injuries

the plaintiff sustained were due to her own fault, rather than to any negligence of the defendant."

In *Paterson v. Central R. R.*, 85 Ga. 654, 11 S. E. 872, Paterson, a passenger, went out on the platform of the car and down the steps. After station was called and train slowing down to stop at Waynesboro, where Paterson lived, the train had to cross Whitaker street; there, as the train had to slow up, he intended to get off. While so standing on the steps of the platform at about the Whitaker street crossing, the train suddenly jerked forward, and Paterson was thrown into the street and injured. The Court says: "The injury complained of by the plaintiff in error was caused by his own fault or negligence, and not by the fault or negligence of the company. So we think the Court committed no error in sustaining the demurrer in this case."

By the Civil Code of Georgia, sec. 4426, we find the following that applies both as to employees and passengers as a rule: "If by the use of ordinary care the party injured could have avoided the injury caused by the alleged negligence of the railroad company, he is not entitled to recover."

In *Sundy's case*, 96 Ga. 819, 23 S. E. 841, the Court says: "The plaintiff's husband, an employee of the street railroad company, having been killed by coming violently in contact with a post very close to the track, while he was riding on the front end of an extra car upon which he was being sent to the relief of a disabled car of the company, and it appearing that at the time of the collision he was standing on the steps of the platform, leaning outwards and looking backwards underneath the car on which he was riding, and there being no evidence showing that he was then under any necessity or duty of being in this position, it does not affirmatively appear that he was free from negligence. Although the evidence warranted a finding that locating the post so near the track was a negligent act, it does not show that so doing was violative of any duty due by the company to the deceased at the time he was killed, and therefore this act was not, relatively to him, a negligent one; and, as no other

negligence was alleged or proved against the defendant, the plaintiff failed to establish that, so far as her husband was concerned, the company was negligent at all."

In *Lindsay v. Southern Ry.*, 114 Ga. 896, 41 S. E. 46, the plaintiff went out on the platform and on the steps, preparatory to alighting, when he discovered a telegraph pole, and fearing he would be struck, he turned loose, fell to the ground, and was injured. The Court held under these facts he could not recover, and that the railroad company was not liable therefor.

In *Simmons v. S. A. L. Ry.*, 120 Ga. 225, 47 S. E. 570, 1 Ann. Cas. 777, it was held that Simmons, who was a passenger, notified the conductor that he wanted to get off at Meldrim. On reaching Meldrim and seeing the train was moving from the station, he went to the platform and down the steps, and while in the act of stepping off, discovered baggage and obstructions in the way. The conductor signaled the train forward, and the engine jerked, and Simmons was thrown to the ground. Held, that he could not recover.

We think that, applying the facts as proven to the law of Georgia that the nonsuit was properly granted, the evidence fails to show any negligence on the part of the defendant that in any manner contributed to his injury as the proximate cause, but, on the contrary, that Talbert was injured by his own negligence and want of care on his part, and this negligence and want of care was the sole cause of his injury. There is no evidence in the case whereby a reasonable man could have drawn any other conclusion or inference.

All exceptions are overruled, and judgment affirmed.

MR. JUSTICE GAGE did not sit in this case.

FOOTNOTE—As to the right of a passenger to a seat, see note in 22 L. R. A. 259.

Upon the liability to a passenger riding on platform of railroad car with knowledge of carrier, see note in 1 L. R. A. (N. S.) 1145.

On the question of riding on platform of railroad car as negligence, see note in 29 L. R. A. (N. S.) 325.

REP.]

November Term, 1918.

8768

HARTZOG-HAGOOD LIVE STOCK & VEHICLE COMPANY v.  
WILSON.

(81 S. E. 180.)

## ATTACHMENT. ACTION FOR RECOVERY OF PURCHASE MONEY.

Where the buyer of a black mule who had given a purchase money note therefor, exchange it with the seller for a roan mule, paying the difference in cash and agreed to execute a note for the balance, which he failed to do, the debt due seller was for the purchase money of the roan mule, and in an action for the amount so due, such mule could be attached and sold to satisfy the judgment. Code Civil Proc., sec. 298.

Before PRINCE, J., Greenwood, April, 1913. Affirmed.

Action by the Hartzog-Hagood Live Stock and Vehicle Company against H. W. Wilson to recover purchase money for mule sold. From judgment for plaintiff, defendant appeals.

*Messrs. Tillman & Mays and D. H. McGill*, for appellant, cite: Code Civil Proc. 298. *Meaning of purchase money*: 15 S. C. 41, 70; 59 S. C. 70; 7 Words and Phrases 5857.

*Messrs. Grier, Park & Nicholson*, for respondent.

March 26, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

This case was brought in the magistrate's Court. The defendant-appellant obtained from the respondent a black mule and executed to the respondent a note which provided "that the title to said property shall remain in said plaintiff until the purchase price therefor should have been paid in full, and upon default in the payment of said note or in the sale of the property, the plaintiff was authorized to take possession of said property and sell the same in accordance with the requirements of law and apply the

proceeds of sale to said debt and the costs and expenses thereof."

The appellant carried the black mule back to the respondent and exchanged the black mule for a roan bay mare mule. The difference in the price of the two mules was fifteen dollars. The appellant paid the difference in price and agreed to execute another note with similar provisions, but did not do so. The time for payment has passed and the debt has not been paid. The respondent brought suit for the ninety dollars and seized the mule.

The agreed statement of facts shows the following: "Upon appearing in the case the defendant moved to dissolve the attachment in this case on the following grounds:

1. That the property seized herein, to wit, one roan mare mule, is worth more than \$100.00 and was not subject of attachment in the magistrate's Court.

2. That the property seized herein, to wit, one roan mare mule, is not the mule for which the defendant owes the plaintiff the balance due and the balance due is not purchase money for the roan mule, but was purchase money for the black mule and the roan mule is not subject to attachment for a debt on another mule, nor is the debt due on the roan mule whatsoever."

The magistrate found in favor of the respondent for ninety-one dollars and eighty-six cents, and found that the debt was for the purchase money of the roan mule, and directed the sheriff to sell the roan mule to pay the debt. From this judgment there was an appeal to the Circuit Court which affirmed the finding of the magistrate. This appeal is from the order of Judge Prince, affirming the judgment of the magistrate.

There are five exceptions, but they raise but a single question, to wit, was the debt due for the purchase money of the roan mule?

There is nothing in the case to question the fact that the appellant owes to the respondent the sum of ninety-one and

REP.]

November Term, 1918.

86-100 dollars. The appellant owes the respondent, so far as the case shows, for nothing except the debt for the roan mule. He owes nothing for the black mule because, by agreement, the black mule was returned and the roan mule was substituted for it.

The debt is for the roan mule, and the judgment appealed from is affirmed.

8769

TAYLOR v. KING.

(91 S. E. 172.)

## MORTGAGES. PAYMENT. TENDER. FORECLOSURE. ATTORNEYS' FEES.

1. Where a note and mortgage, providing for attorneys' fees if placed in the hands of attorneys for collection, were placed in attorneys' hands before the date to which the time of payment had been extended and before such date the amount due was tendered, a Court of equity which has control of such contracts for attorneys' fees would deny a recovery of such fees.
2. Where a mortgagee refused a tender because he thought a year's interest had not been paid, he could not afterwards attack the sufficiency of the tender because of a slight deficiency in the amount tendered.
3. A mortgagee could not recover interest, cost, and attorneys' fees, notwithstanding his refusal to accept a valid tender, because of the failure of the mortgagor's agent to date a credit on the note, as it was his own duty to enter the credits on the security of which he had possession, which obligation was not changed by allowing the mortgagor's agent to do it, especially where it did not appear that the tender would have been accepted if the credit had been dated.

Before SHIPP, J., Greenwood, December, 1913. Affirmed.

Action by George H. Taylor against Mrs. Lila O. King and others to foreclose a mortgage. From a judgment for plaintiff for an insufficient amount, he appeals.

*Messrs. Giles & Ouzts*, for plaintiff, cite: *No evidence to support findings of fact*: 51 S. C. 362; 55 S. C. 198; 67 S. C. 541. *Sufficiency of tender*: 71 S. C. 250. *Effect of tender*: Code, sec. 3461. *Attorney's fees*: 71 S. C. 258; 50 S. C. 303; 84 S. C. 458.

*Messrs. Tillman & Mays*, for defendant.

March 26, 1914.

The opinion of the Court was stated by MR. JUSTICE FRASER.

This is an action to foreclose a mortgage given by Mrs. Lila O. King to the Loan & Exchange Bank on November 18, 1904, and duly assigned to the plaintiff. The case shows that "it is admitted by counsel that tender for \$1,636.21 was made December 7, 1912." The tender was refused because the appellant claimed that an installment of interest due in 1911 had not been paid. It is now admitted that the 1911 interest had been paid. It is claimed and not denied that Mrs. King had until January 1, 1913, in which to pay the note. The appellant himself says: "After December 7, 1912, I put the paper in Giles & Ouzts' hands for collection." The tender was 66 cents short of the amount due, but it was not refused on that account, but because appellant claimed that the interest for 1911 had not been paid. Foreclosure proceedings were commenced. The case was referred to the master, who found for Mrs. King on the question in dispute, and refused to allow attorney's fees provided for in the note, on the ground that plaintiff was at fault in that Mrs. King would have paid the debt if plaintiff had not erroneously claimed interest for 1911. On appeal from the master's report, Judge Shipp affirmed the master's finding and ordered the plaintiff to pay the costs and refused to allow interest after the date of the tender. From this order the plaintiff appealed upon the following exceptions:

Exception 1: "Because it was error in the master to find as a fact that 'the defendant made an effort to settle the note and mortgage before the papers were placed in the hands of Messrs. Giles & Ouzts, attorneys, but a  
1 certain payment, to wit, \$130.40, on February 2, 1910, was disputed, and there was no settlement,' and it is most respectfully submitted that it was also error in the Circuit Judge to concur in this finding of fact: (a) Because there is no testimony in the record which even tends to support such finding of fact. (b) Because the entire testimony negatives said conclusion. (c) Because the only and undisputed testimony shows that the first time the dispute arose over the credit of February 2, 1910, \$130.40, was by Mr. King with Giles & Ouzts after the mortgage had been placed with them for collection. (d) The testimony conclusively shows that Mr. King did not see Mr. Taylor or attempt to have a settlement with him after 'some time in October, 1912,' but dealt altogether with Giles & Ouzts, with whom the note and mortgage had been placed for collection." Appellant means 1911, not 1910.

The appellant said: "After December 7, 1912, I put the papers in Giles & Ouzts' hands for collection." The tender was made on December 7, 1912. It is claimed, however, that the letters of Giles & Ouzts speak for themselves and show as a matter of fact that the note and mortgage had been put in the hands of plaintiff's attorneys as early as November 11, 1912. There is nothing in the case to warrant the placing of the papers in the hands of attorneys before they were due. The plaintiff only claims that he notified the respondent that he wanted his money by December 1, 1912, and admits that he may have agreed to extend the time to January 1, 1913. It would be a great hardship (a hardship a Court of equity would not sanction) to allow an obligee to put his securities in the hands of his attorney before maturity, and require the obligor to pay principal and interest and 10 per cent. attorney's fees, even



though payment is made on the day the obligation is due. Here the record shows, and it is not controverted, that tender was made on December 7, 1912. The sufficiency of that tender is now denied only on one ground that will be considered later, and that attorney's fees are not included. That the Court has control of these contracts for attorney's fees is decided in the recent case of *Coley v. Coley*, 94 S. C. 386, 77 S. E. 49.

This exception is overruled.

Exception 2: "It was error to hold that the tender was sufficient: (e) Because the amount tendered was not sufficient. (f) Because under the terms of the contract 2 sued on the defendant had agreed that she would pay all costs of collection, including 10 per cent. attorney's fees if this note was placed in the hands of an attorney for collection."

If the insufficiency refers to attorney's fees, what has been said disposes of (e).

If the insufficiency refers to the 66 cents, then the question cannot now be raised. Am. & Eng. Encyclopædia of Law (2d ed.), vol. 28, p. 18: "Where a tender is refused, not on the ground that the amount is too small, but on some other ground, the objection to the deficiency of the amount is waived." Here the tender was refused because a year's interest had not been paid, and it appeared that the year's interest had been paid. What has been said disposes of the second subdivision.

Exception 3: "Because the master and Circuit Judge both erred in holding that it was not the fault of the defendant that the payment of \$130.40 of February 2, 1910, 3 was not credited on the note, when the testimony showed that B. F. King made the credit on the note himself, and his carelessness in not dating said credit was the sole cause of the dispute."

It was appellant's duty to enter the credits. He had possession of the security. That he sometimes allowed the

REP.]

November Term, 1918.

agent of Mrs. King to enter the credits does not change the obligation. It does not appear that a date would have helped matters. The production of the check itself did not settle the controversy. The appellant still claims that the face of the check is suspicious inasmuch as the date is in pencil and the body of the check is in ink.

This exception is overruled.

Exception 4: "It was error in the master and Circuit Judge to hold that \$1,630 with interest from November 18 to December 7, 1912, was the amount due on said note, when the undisputed record evidence shows that said notes had been in the hands of the attorneys for collection since November 11, 1912, and the defendant had never claimed that the same was not past due."

This exception is overruled for the reasons above stated. The judgment appealed from is affirmed.

8770

WREDEN v. MARJENHOFF CO.

(81 S. E. 160.)

MASTER AND SERVANT. INJURIES TO SERVANT. CONTRIBUTORY NEGLIGENCE. QUESTION FOR JURY.

Where a servant was injured in putting candy on a pulling machine while in motion, and two witnesses testified that the work could not be performed unless the machine was in motion, whether plaintiff was negligent in so doing was for the jury.

Before DEVORE, J., Charleston, April, 1913. Affirmed.

Action by Henry J. Wreden, by his guardian *ad litem*, Minnie Wreden, against the Marjenhoff Company. From a judgment for plaintiff, and an order denying motion for new trial, defendant appeals.

*Messrs. Mordecai & Gadsden and Geo. H. Moffett, for appellant, cite: Servant undertaking to do his work in an obviously dangerous way cannot recover: 61 S. C. 489; 81 S. C. 530; 82 S. C. 542; 84 S. C. 364; 85 S. C. 363; 89 S. C. 502. Servant's injury due to his failure to use appliances furnished by master: 72 S. C. 97; 20 Am. & Eng. Enc. of Law 78; 86 S. C. 69. Obvious danger: 55 S. C. 483; 80 S. C. 232. Defendant's negligence not proximate cause of injury: 39 S. C. 39. Obeying obviously dangerous instructions: 82 S. C. 542; 84 S. C. 364; 86 S. C. 229; 77 S. C. 328; 61 S. C. 469, 489; Beach Contributory Negligence 442.*

*Messrs. Logan & Grace, for respondent, cite: Evidence for jury: 78 S. C. 251. Evidence sustains allegations: 80 S. C. 545; 67 S. C. 129; 86 S. C. 274; 50 S. C. 37; 86 S. C. 306; 60 S. C. 18. All testimony to be considered: 95 S. C. 136, 243. Assumption of risk was not pleaded. Question of contributory negligence was for the jury: 80 S. C. 232. •*

March 26, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This is an action for damages alleged to have been sustained by the plaintiff through the wrongful acts of the defendant.

The appeal is from an order refusing a motion for a nonsuit, also from an order overruling a motion for a new trial, on the same grounds.

The allegations of the complaint material to the questions involved are as follows: "That on or about the 3d day of January, 1910, the plaintiff, above named, Henry J. Wreden, who at that time was a minor of the age of 17 years, was in the employ of said defendant corporation as a second helper in the candy department of said corporation.

REP.]

November Term, 1918.

That, as such second helper, it was the duty of plaintiff to operate a candy-making machine. That, in the course of his employment attending to said candy-making machine, the candy broke, and plaintiff, as his duty and employment required him to do, endeavored to place said candy back on said machine. That, as plaintiff was endeavoring to put the candy on said machine, he was suddenly caught by one of the arms of the machine, and whirled over and caught on another arm of the machine, and his leg caught in said machinery, and, before he could be extricated therefrom, his left leg was broken, torn, cut, and mangled, and seriously and permanently injured. That the injuries to plaintiff as aforesaid were caused by the negligence, carelessness, recklessness, and wantonness of said defendant corporation, its agents and servants, in the following particulars, to wit: (a) In failing and neglecting to have said candy-making machine equipped with a clutch, so that said machine could have been stopped instantly, and plaintiff not injured. (b) In failing and omitting to furnish said plaintiff with a reasonably safe place to work by reason of the absence of a clutch for the instant stopping of said machine."

The defendant denied the alleged wrongful acts, and set up the defense of contributory negligence on the part of the plaintiff.

The jury rendered a verdict in favor of the plaintiff for \$6,000, and the defendant appealed upon the following exceptions:

First. "Because the Circuit Judge erred in refusing the defendant's motion for a nonsuit made upon the ground that the only inference from the testimony for the plaintiff is that he was guilty of contributory negligence as alleged in the answer, in that he undertook to do the work in an obviously dangerous way, when there was a safe way provided by the master."

Second. "This is so even though the plaintiff was instructed by the master to do the work in the dangerous way, or so did it in the presence of the master."

In refusing the motion for nonsuit, his Honor, the presiding Judge, said: "The reason why I cannot nonsuit this case is because the witnesses on the stand stated that he could not do this work unless he did it that way; unless he put this candy on while this thing was in motion, the candy would not have been pulled. Now, whether that is so or not is for the jury, and whether doing that or not was negligence on his part is a question of fact for the jury. Two witnesses in this case said they could not perform this work unless they put this candy on while the machine was in motion; that is the reason I cannot nonsuit this case; but for that statement, I would have nonsuited it."

The reasons assigned by his Honor, the presiding Judge, in refusing the motion for a nonsuit are satisfactory to this Court.

Judgment affirmed.

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8854

JENNINGS *ET AL.* v. McCOWN *ET AL.*

(81 S. E. 968.)

**CERTIORARI. ELECTIONS. ILLEGAL VOTES.**

1. On *certiorari*, the Supreme Court will not review findings of fact of an inferior body or Court, unless they are wholly unsupported by evidence.
2. Where, in an election to determine the question of the sale of intoxicants, enough illegal votes were cast to affect its validity, the election is void if the irregularities were such as to leave it doubtful whether the polls could be purged of them.

Original jurisdiction. Petition dismissed.

Petition for writ of *certiorari* to review action of State board of canvassers on appeal from the county board of

canvassers of Sumter county, in the matter of an election upon the question of the sale of alcoholic liquors in said county.

*Messrs. L. D. Jennings and J. H. Clifton*, for the petitioners, cite: *Contestants waived right to question form of ballots*: 78 S. C. 467; 73 S. C. 401. *Form prescribed by special act*: 27 Stats. 745. *Provisions as to form of ticket directory*: 86 S. C. 460, 461; 52 S. C. 299, distinguished, or in conflict with 73 S. C. 298; 76 S. C. 589; 78 S. C. 467; 79 S. C. 248; 86 S. C. 460; 80 S. C. 20. See, also, 20 S. C. 361; 15 Cyc. 245; 19 L. R. A. 172; 25 L. R. A. 486. *Findings of fact without evidence error of law*: 86 S. C. 455. *Jurisdiction of State board of canvassers is appellate only*: 33 S. C. 602.

*Messrs. Purdy & Bland, Davis D. Moise and M. W. Seabrook*, for D. James Winn *et al.*, cite: *Only errors of law reviewable*: 86 S. C. 455. *Illegal votes rendered result of election doubtful*: 76 S. C. 574; 84 S. C. 48. *No signatures to petition will avail except those of qualified electors*: 76 S. C. 423. *Qualifications of voters*: 84 S. C. 48. *Form of ballots*: 52 S. C. 298. *Irregularities*: 79 S. C. 414; 78 S. C. 461.

*Mr. Attorney General Peebles and Mr. Assistant Attorney General Dominick*, for respondents.

May 20, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

On motion of the petitioners, a writ of *certiorari* was heretofore issued by one of the Justices of this Court, directed to the State Board of Canvassers, and requiring them to certify to the Court the record in the matter of the contest of

the election, held in Sumter county, on August 19, 1913, on the question of the sale of alcoholic liquors in said county. The vote in the election was very close. On the face of the returns, the vote stood 474 for sale, and 489 against sale, a majority of 15 votes against sale. Both sides contested the election before the county board of canvassers. After hearing the evidence and arguments on the various grounds of contest, the county board declared the result to be 470 votes for sale and 466 against sale, a majority of 4 votes for sale. Both sides appealed to the State board of canvassers. On hearing the appeals, the State board found and declared that, on account of irregularities in the election, sufficient to affect the result thereof, and on account of the form of the ballot used, there had been no legal election, and that the election was null and void. In its opinion the board said: "We are unable to find that a majority of the votes cast at said election were either for or against the sale of alcoholic liquors and beverages. Said election was so close that existing irregularities are sufficient to affect the result or make it doubtful and difficult to determine. In fact it is impossible to do so, as we cannot positively say on which side each and every illegal vote was cast: 'And when such irregularities or illegalities are of such a character and extent as to leave it doubtful, whether the result has not been affected, and especially when it appears that illegal votes have been cast, sufficient in number to affect the result, and the polls cannot be purged of them, it would be a travesty on popular government to sustain the election,' said Judge Hydrick in deciding the Wright case, which opinion was confirmed by the Supreme Court. This within itself is sufficient to justify us in declaring that there had been no legal election expressing the will of the qualified voters."

It is well settled that this Court will not review the findings of fact of an inferior Court or body, on writ of *certiorari*, unless they are wholly unsupported by the evidence.

*State v. Board*, 86 S. C. 455, 68 S. E. 676. It is  
1. 2 equally well settled that, when a sufficient number of  
illegal votes have been cast in an election to affect the  
result, and the polls cannot be purged of them, the election  
cannot be sustained. *Wright v. Board*, 76 S. C. 574, 57  
S. E. 536; *Gunter v. Gayden*, 84 S. C. 48, 65 S. E. 948.

It is only necessary, therefore, to inquire whether the finding of the State board that illegal votes, sufficient in number to affect the result, were cast in the election, and that the polls cannot be purged of them, has any evidence to sustain it. A discussion of the evidence in detail is unnecessary and can serve no useful purpose, but a careful consideration of it not only shows that the findings of the board are supported by the evidence, but that, upon the application of correct legal principles to it, the board would have been warranted in reversing the judgment of the county board and declaring the result to be against sale. But, as the finding made has support in the evidence, it cannot be reviewed.

This conclusion makes it unnecessary to consider the second ground upon which the board rested its decision. But see *Rawl v. McCown*, 97 S. C. 1, 81 S. E. 959.

MESSRS. JUSTICES WATTS and FRASER concur in the result.

MR. JUSTICE GAGE did not sit in this case.

END OF THIS VOLUME.



# APPENDIX.

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## EXERCISES ON PRESENTATION OF PORTRAIT OF THE LATE JOSEPH DANIEL POPE.

On January 29th, 1914, at 4 p. m., the Supreme Court convened.

Mr. John J. McSwain, a member of the Bar, on behalf of two hundred and forty law students who had studied under the late Joseph Daniel Pope, as professor of law in South Carolina College, and University, presented to the Court a portrait of this eminent professor, and said:

"May it please your Honors:

"It was not my privilege to graduate in the law school conducted by the late Jos. Daniel Pope. After I had been a short time under his instruction, pressure of finances compelled me to return to the schoolroom to make a support.

"The afternoons and evenings there were filled with study for examination by this Court, finally enabling me to become one of the classes enjoying the peculiar distinction of having licenses signed by four Chief Justices.

"But when I explained to 'The Colonel'—others might be 'Colonel,' but he was 'The Colonel,'—how necessity was separating us from the mutually pleasant pursuit of devoted studies, a fatherly hand, full of generous tenderness, fell on my youthful shoulders, and following the formal words, 'good-bye,' was the heartfelt, 'God bless you, my boy,' which has ever since rung in my memory as a sacred benediction.

"It is easy, then, to understand how much pleasure it is to come to this Court as one of the spokesmen for the two hundred and forty boys—now become men, who do rise up to testify to many such instances of noble and inspiring sympathy. After much delay and some discouragement, we now joyfully give into the keeping of this Court, as a perpetual, though inadequate, testimonial of our esteem and love, this portrait of him, who was not only our helpful teacher, but our faithful friend.

"And here we might rest, so far as we who knew him are concerned. No words of mine can exalt the memory or enlarge the estimate of his friends. But in order that his and our children's children may understand how the elements of greatness were so mixed in him, we this day stand up with uncovered heads to say: 'Here was a man—when shall we look upon his like again?' For such purpose only do we essay a partial outline of his greatness.

"First and foremost, he was a man of large and balanced proportions in every essential respect. Large and powerful in physique, dignified but gracious in mien and movement, courteous and courtly with every rank and class.

"Born of English extraction and educated parents, in the family of a prosperous sea-island cotton planter of St. Helena Island, Joseph Daniel Pope enjoyed cultivated influences in his home, and the best educational opportunities of the day, in the elementary school, the classical school at Walterboro, and finally graduated from the University of Georgia. Then followed years of tutelage as a student in the office of Jas. L. Petigru, until admission to the Bar in 1845.

"Who can calculate the influence upon the lives of young men of such a preceptor as Jas. L. Petigru? Himself a native of Abbeville, in the Piedmont region, a student of Moses Waddel at Willington, as were Calhoun, McDuffie, Legare, Butler, Noble and others, practicing law for more than a half century in Charleston, a unionist in politics as opposed to the school of Calhoun, such a preceptor must have made a deep impression on the young Pope, who after the waves of secession had risen and the tides of war had fallen, after the gloom of reconstruction, the midnight blackness of carpetbag rule, and the glorious sunrise of '76' (when a new age and a new era had dawned in the old State), was to establish the first law school in her borders, and thus by the power of personality, link the present with the past, and inspire young men from all sections to love her traditions, her laws, and her people.

"A seeming digression is justified by a paradox. Petigru was a patriot of broad outlook—no narrow sectional feelings confined his devotions to the welfare of his fellow men—which is true patriotism. Quoting from Gov. B. F. Perry, 'He said

he had no love for the swamps of the low country, or the mountains of the upper country. (Saying) "Where liberty dwells, there is my country." Such a sentiment should ever be associated with Jefferson's memorable utterance: 'I long ago swore upon the altar of God, eternal hostility to every form of tyranny upon the mind of man.' And yet Jos. Daniel Pope was such an admirer of Calhoun that he sought to emulate his matchless style of exposition, and argument, and was a signer of the Ordinance of Secession—so sharply did the sword of dissension divide the body politic! May we not fairly assume that the subject of this sketch sought to appropriate the best in both of these heroes of thought and action, and by his life, precept, and example, to show us how loyalty to our own State and her peculiar institutions, is entirely compatible with allegiance to the Federal Union, whose ægis spells freedom and far-reaching blessings for all the people of these two continents.

"The devastations of war leaving the coast region barren and her people penniless, Colonel Pope moved to Columbia, having been a member of the Beaufort Bar for twenty years. Though his practice here was large and profitable, a growing deafness tending to impair his efficiency in jury trials, may have partially influenced him to entertain the suggestion of the Trustees of the University of South Carolina, to organize there a law department, which was done in 1885, and from then until his death on March 21, 1908, his whole energy of head and heart was given unreservedly to the work of training young men for the law.

"This was pre-eminently his life work, great as were his labors and successes in other fields. Then we may consider, what were his qualifications to become an instructor of youth? How could he turn aside from a lucrative practice with its luring ambitions, to become a mere teacher with a small salary? The answer is found in his broad sympathy, growing out of a burning patriotism. He sees a new epoch in the State. New and strange forces are tearing at the landmarks of our jurisprudence. The former practice of 'reading law' in some lawyer's office is about past. Many young men are attending law schools in other States, some even in the North and East. We have schools of medicine and divinity; shall the culture of

law, the very framework of civil society, be entirely neglected in Carolina, the native State of so many distinguished lawyers and jurists?

"It was the call of patriotism, a call that never fell upon his ears unheard—it was a patriot's duty, a duty that his hands never left unperformed.

"The mental equipment of Colonel Pope for the work of teacher was thorough. He grasped the whole field of law and equity as a system of interlocking, interdependent, harmonious principles. Those who regard him as 'rather technical' fail to follow a rare analysis and fail to understand that the principles of substantive law must be technical, however liberal the practice may be. The line of demarkation between what is law, and what is not law—between what the law commands as right and prohibits as wrong, cannot be made too plain and obvious.

"With such equipment of spirit and mind, success would seem inevitable, as it indeed was. The influence of Colonel Pope on the State as a law teacher is widespread and enduring. With lawyers as leaders not only in shaping but in demanding reform legislation, with lawyers at the Bar and on the Bench, in editorial chairs, as presidents of banks, cotton mills, and railroads, as farmers, and forerunners in the race of progress, whatever be the field of action, it may be safely stated that he who trains and develops the thought, principles, and practices of lawyers must directly and powerfully affect the progress and well-being of society. With such an opportunity and such a responsibility, be it said to the undying credit of our beloved teacher, no mean and ignoble feeling ever found utterance on his lips, no selfish and narrow policy ever marred the purity of his teachings. He summoned us to his own high conception of the lawyer's profession, saying: 'We are ministers of society, and priests of justice; let our action and speech constantly mirror the ideal South Carolina gentleman.'

"Law is that part of public opinion enforced by the Courts. Its zone is constantly widening by precedent and legislative enactment; while the latter is more obvious, perhaps the former is more permanent and far-reaching. Not only do the Courts say what the Legislature means, but the principles of judicial interpretation are presumed to be a part of every statute. In

such a system of government, our judges should be citizens of the most patriotic ideals; and the judges are drafted from among the lawyers. Furthermore, a judge can only decide with the lawyers on one side or the other. Arguments of lawyers become decisions of Courts. As the lawyers are, therefore, the judges are. But the lawyer's ideals are most largely determined by his preceptor in office, or teacher in the law school. If this be true, is it extravagant to say that the ideals of Jos. Daniel Pope, received by him from such as Petigru in the office and at the Bar, such as McDuffie and Calhoun in public life, and such as O'Neal and Wardlaw on the Bench, still and shall continue by the subtle power of influence, to be reflected by judicial decisions, and so to ennoble the life of the people he loved?

"It may well be the marvel of thoughtful people in this State, and more especially in other States, that our judiciary maintains so high a standard of ability, and such unquestionable purity, despite the pitifully small salaries paid, and constant work of study and travel required. Leaders in the legal profession as they are, do they receive compensation comparable with the incomes of leading lawyers, doctors, bankers, mill presidents, or even mill superintendents? Can their willingness to serve the State be explained except by devotion to these ideals of patriotic duty? And surely no man in all the history of our State, either by act or word, ever more magnified the standards of professional service to the State than did Jos. Daniel Pope.

"What greater service could now be rendered the State than the enlargement and strengthening of the law school our lamented teacher founded? If requirements for admission to the Bar were so raised as to force preparation in a law school, associations of students with high-minded teachers and with each other, would form correct ideals, and thus react upon all the people; for the masses are taught by the lawyers.

"Let this likeness of the honored and venerated dead take its place in this gallery of fame; let its amiable and benignant countenance look down upon us and those who shall come after us, as we, and they, shall seek to make new application to new conditions of the old and unchanging principles of human justice.

"In the presence of such inspiration, may our minds ever be quickened to a clearer perception of truth, and may the honor of the profession, the welfare of the State and nation, and the rights of mankind, fill our hearts and make us worthy of such a heritage."

Mr. McSwain then submitted to the Court the following sketch of the Law School in the University of South Carolina, which had been prepared at his request and furnished by Mr. Washington A. Clark, a member of this Bar, as follows:

### SKETCH OF THE LAW SCHOOL OF SOUTH CAROLINA UNIVERSITY.

BY WASHINGTON A. CLARK, Class of 1871.

By an Act of the Legislature entitled "An Act to Establish the University of South Carolina," approved 19th day of December, 1865, it was among other things enacted as follows:

*Whereas*, The proper education of youth is a matter of vital importance to this State in its present condition, and ought to be the special object of legislative attention; and,

*Whereas*, The conversion of the South Carolina College into an University will meet its great demand, and will foster all the elements which have heretofore contributed to its intellectual and moral power, and will preserve its unity and glory:" \* \* \*

"V. The Board of Trustees may, if it is deemed proper, give a license to one or more persons learned in the law, and one or more Professors of Medicine, to give instruction in their respective professions in the said University, and assign to them, or any of them, a lecture room, or lecture rooms, in which, at times, and under terms and conditions, and with tuition fees prescribed by the said Board, they may respectively form classes and deliver instructions in their respective professions; and the same license may, if deemed proper by the said Board, be given to a person or persons qualified to instruct in any mechanical or practical pursuit. None of the branches of instruction provided for in this section shall be considered as schools, or included in the number necessary to be taken by any person before matriculation."

By a further Act of the Legislature entitled "An Act to Amend the Act Establishing the University of South Carolina," approved December 20th, 1866, it was among other things enacted:

"I. *Be it enacted* by the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, that the fifth section of an Act entitled 'An Act to Establish the University of South Carolina,' ratified on the nineteenth day of December, in the year of our Lord one thousand eight hundred and sixty-five, be so amended as to require the Board of Trustees of the University of South Carolina to establish, as soon as practicable after the ratification of this Act, a School of Law, with one professor, and a School of Medicine, with two professors.

II. That the Board of Trustees shall determine and regulate the course of studies in the said schools, and the duties of the professors in the respective departments thereof; and shall, as soon as practicable, select competent persons to the professorships so established.

III. That the professors in said schools shall be entitled to the same salary as is provided by law for the other professors of the University, and shall receive such fees of the students who enter their schools as are required, or may hereafter be required, under and by virtue of the fourth section of the Act aforesaid, of the students who enter the schools by said Act provided for.

IV. That the said professors shall be members of the faculty of the University of South Carolina, in like manner as the other professors, and shall in all respects be in like manner, subject to the provisions of the aforesaid Act, and to the rules and regulations imposed by the Board of Trustees.

V. That the Board of Trustees of the University, on the recommendation of the Chairman of the Faculty, and of the professors of the Schools of Law and Medicine, shall confer the degrees of Bachelor of Law and of Doctor of Medicine upon the graduates of the said schools, for satisfactory attainments in all the subjects of instruction in their respective schools.

VI. That the graduates of each of these schools, upon whom the said degrees may be conferred, shall be entitled to pursue and practice their profession."

In pursuance of the Acts of the Legislature, a Law School was established in the South Carolina College in the year 1867.

Chancellor J. A. Inglis, one of the distinguished Chancellors of our Court of Equity, was in January, 1867, elected to fill the Chair of Law thus established. He, however, having decided to continue the practice of his profession in Baltimore, declined to accept this chair.

In the month of June following, Col. Alexander Cheves Haskell, an honored graduate of the class of 1860, was elected to this chair, which he filled with distinction, but in order to devote himself to the active practice of the law, resigned in August, 1868, at which time he became associated with that distinguished lawyer, the Honorable Jos. Daniel Pope, whose portrait is now presented to the Court, under the firm name of Pope & Haskell.

In July, 1869, Cyrus Davis Melton, then regarded as one of the most distinguished lawyers in this State, was elected to that chair, which position he filled with distinction until the date of his death on the 5th of December, 1875.

In the catalog of the University of S. C. for the year 1869 we find the following information in respect to the law school, as it then existed:

"XI. *School of Law*—C. D. Melton, Professor. The design of this school is to acquaint the student with the principles, and prepare him for the practice of his profession.

The Course of Instruction embraces the various branches of the common law, and of equity; commercial, international and constitutional law. Instruction is given through textbooks and daily examinations upon the subject taught and by oral lectures. A Moot Court is held in connection with the school to perfect the student in the details of practice—at which a case is assigned, argued and conducted, legal papers drawn, and opinions delivered by the students, under the immediate supervision of the professors.

The students are divided into two classes, and the course of studies so arranged as to be completed into two academical



years; though by entering both classes a student may possibly complete the course in one year.

*Course of Study—Junior Class:* Blackstone's Commentaries; Chitty on Contracts; Kent's Commentaries; Constitution of South Carolina; Constitution of the United States; Lectures with reference to Vattel on the Law of Nations; and other Treatises on Public and Constitutional Law.

*Senior Class:* Stephen's Pleading; Greenleaf's Evidence; William's Law of Executors; Bayley on Bills; Smith's Mercantile Law; Russel on Crimes.

*Equity*—Mitford's Pleadings, Adam's Equity.

The Statute Laws and State Reports to be treated in connection with the subjects as they arise." \* \* \*

*"Degrees Conferred*—The degrees offered by the University shall be the following: \* \* \*

III. That of Bachelor of Law, to be conferred for satisfactory attainments in all the subjects taught in the school of Law. \* \* \*

"Expenses for the session of nine (9) months: \* \* \*

Tuition fee for the School of Law \$50.00."

Upon the death of Mr. Melton, the Hon. Franklin J. Moses, Senior, then Chief Justice of the Supreme Court of the State of South Carolina, was elected to fill the Chair of Professor of Law, and continued at the head of the Law Department of the University until his illness and death, which occurred on the 6th of March, 1877.

The chair then remained vacant, for we were then in the midst of the controversy between the Hampton and Chamberlain factions, which terminated in favor of the former, in the month of April. At the close of the college year in June, 1877, all the professors of the University were removed and the exercises closed until 1880, when the institution was again opened as an Agricultural College. The Law School, however, was not re-established until this institution was again enlarged into a University under the Act of the General Assembly of 1882.

From an article by Prof. E. L. Green, which appeared in *The State* of January 3d, 1911, entitled "The History of the University of South Carolina," we learn:

"A 'School of Medicine and Pharmacy' and a 'School of Law' were added to the departments of the college in 1884. A beginning of the first school was made by the formation of a two-year course for which a certificate was given. Col. Joseph Daniel Pope was elected to the chair of law; he and the president formed a special faculty for the consideration of all matters relating to this school. Prof. Pope was given the fees arising from tuition and a small fixed salary; later this professorship was made co-ordinate with the others. Special provisions were to be made for short courses of lectures by leading members of the Bar. Prof. Pope conducted this work by himself till 1900, when an assistant, M. Herndon Moore, was elected to relieve him of part of the teaching."

Prof. Pope, one of the most distinguished equity lawyers who had ever graced the Bar of this State, and in all branches of the law learned, and withal a most interesting and instructive lecturer on all legal topics, occupied this position until his death on the 21st of March, 1908. For fourteen years, therefore, Prof. Pope continued to impart to the students of the law, his large experience gained under the old practice when certain lawyers in this State were recognized as leaders of the American Bar. The law students, therefore, of this period enjoyed the privilege of sitting at the feet and gaining instruction of this learned lawyer.

From a further article on the History of the University by Prof. Green, which appeared in *The State* on May 21, 1911, we learn: "Col. Joseph Daniel Pope died at his home in Columbia March 21, 1908, at the age of 81. He had founded the present law school and had by himself carried on all the instruction till 1901, but in this year he became emeritus Professor of Law, and part of the work which had become too heavy for him was given to Adjunct Prof. Herndon Moore. Prof. Moore was promoted to full professorship on the 7th of March, 1906.

On March 8th, 1908, John P. Thomas, Jr., a distinguished member of the Columbia Bar, was elected to a professorship in this department of the University.

Upon the death of Prof. Herndon Moore, Mr. E. M. Rucker, a member of the Anderson Bar, was elected by the Executive Committee to fill his chair temporarily, and on the 7th of

June, 1910, he was elected with full professorship by the Board of Trustees.

Upon the death of Prof. Pope, Prof. J. Nelson Frierson was elected as a professor in this school and Mr. John P. Thomas elected Dean.

The School of Law now enjoys a large attendance under the law faculty as above named.

The following is a list of graduates of the Law School from its foundation to the present time :

LL. B.

1868—Arthur C. Moore, John T. Sloan, Jr.

1870—J. S. Clifton, H. G. Ewart, C. F. Janney, J. R. Lynn, J. F. Norris.

1871—Edward R. Arthur, Washington A. Clark, Joseph W. Hogan.

1872—J. P. Arthur, B. J. Boone, R. Means Davis, S. D. Epstein, J. T. Seibels, C. E. Spencer.

1873—P. A. Cummings, J. A. Faber, W. H. Faber, J. H. Walker.

1874—C. L. Anderson, Edgar Copless, C. W. Cummings, Walter R. Jones, Niles G. Parker.

1875—Henry A. Fox, Henry B. Johnson, T. McCants Stewart, Joseph H. Stewart, M. A. Warren.

1876—C. J. Bobbitt, Lawrence Cain, Thomas M. Canton, F. L. Cardozo, Richard T. Green, S. L. Hutchins, T. J. Minton, J. W. Morris.

1886—William Gregg Chafee, James Beaufort Davies, David Edward Finlay, James Walter Mitchell, Henry Cowper Patton, William Henry Thomas, George Galletly, Williams Thomas Yancey.

1887—Whiteford Smith Blakely, Samuel Mayrant Clarkson, Mason Langston Copeland, M. Herndon Moore, Joseph Allen McCullough, Lewis Wardlaw Parker, Julius William Quattlebaum, Edwin Wales Robertson, Elbert Marion Rucker.

- 1888—H. Pride Green, Hamilton Andrew Haynes, William Wallace Johnson, Lawson Davis Melton, Jos. Hayne Montgomery, James Keith Summers, Hugh Antwerp Tradewell, Francis Hopkins Weston, Andrew Theron Woodward.
- 1889—William Alexander Barber, George Lynwood Calloway, Wm. Bratton DeLoach, William Davis Douglas, Daniel Heyward Hanckel, Edward Wm. Hart, Jesse Bernard McLaughlin, Fitz Hugh McMaster, John Ashley Sawyer, John Oscar Westfield, Legriel Adolph Wittowsky.
- 1890—Edward McCrady Clarkson, Jr., Frank Albert Dothage, Robert Hayne Henderson, Asbury Gamwell LaMotte, John Lewis Wiggins, John Wilson.
- 1891—John Richard Edwards, William Bates Greenough, Edward St. Julian Grimke, Thomas Cook Hamer, Samuel McGowan, Jr., Daniel Padgett, Jr., Wade Hampton Stack.
- 1892—William Lawrence Bobo, Walter Fleetwood Buyck, James Roland Coggeshall, Arthur Elijah Cornwell, Uriah Xexes Gunter, Jr., Henry Andrew Johnson, Wm. Aiken Kelly, Jr., James Wilbur Means, William Davis Melton, Joseph Bruce Sloan, Aurelius Wallace Thomson.
- 1893—Eugene Walter Able, Gabriel Henry Baum, Thos. Frederick Brantley, William States Jacobs, Henry Felder Jennings, Patillo Homer McGowan, John Hardin Marion, David Harper Means, Robt. Moorman, James Wright Nash, Arthur Sayler.
- 1894—Alfred Bagby, Jr., Samuel Edward McFadden, Berry Washington Miley, Edwin Folk Strother, Jr., William Whetstone Wannamaker, Anton Pope Wright.
- 1895—John Richard Edmunds, Jacob Risher Fairey, Robert Lee Gunter, Benjamin Palmer McMaster, Wesley George Muckenfuss, Robert Chapin Parker.
- 1895—Samuel Means Beaty, Dobert Elliott Copes, David Thomas Johnson, Wm. Harrington Lipscomb, Edward Lowndes Ready, Daniel Hunter Wallace.

- 1896—Atticus Hagood Dagnall, John Thomas Duncan, Bryant Hillary Henderson, Geo. Kershaw Laney, Wm. Fritz Norton, Chas. Julius Redding, William Joseph Thomas.
- 1897—John Beaufort Atkinson, Theodore Gaillard Croft, Victor Eugene DePass, Geo. Prentiss Logan, Ashby Davis McFaddin, Walter Fore Stackhouse, George Myers Stucky.
- 1898—William Duncan Bennett, John Hicklin Clifton, Henry Elliott DePass, Harry Nicholas Edmunds, Luther Munroe Haselden, Charles DePass Jones, LeRoy Lee, Duncan Donald McColl, James Wilson Mixson, Caleb Clark Moore, Alex. Beaty Sherard, Frank Gary Tompkins, Harry Holmes Woodward.
- 1899—Hunter Allston Gibbes, Charles Thomson Haskell, Robert Beverly Herbert, Edwin Leopols Hirsch, Henry Counts Holloway, Minor James Hough, Samuel Douglas Shackelford.
- 1900—Orsamus William Allen, William Gordon Belser, Andrew Fuller Brooker, Louis Marshall Dantzler, John Janney Earle, James Evans, Jr., DeWit Talmage Gray, John Gordon Hughes, Vivian Mordaunt Moses, Egmont Charles von Tresckow, James Harvey Witherspoon.
- 1901—Henry Brabham, Jr., Washington Clark, Augustus Moore Deal, Thomas Austin Miller, Geo. Robert Rembert, Elzy Logan Richardson, Geo. Frederick Stalvey, Lawrence Keitt Sturkie, Albert Creswell Todd, Benjamin Wofford Wait, Geo. White Witherspoon.
- 1902—Chas. Henry Barron, Jr., Albert Lining Burnet, Alva Charles DePass, Thomas Paul Dickson, Leo Darby Gillespie, Joseph Emile Harley, Marion Boyd Jennings, Joseph Edward Leach, Ralph McLendon, Archibald Danner Martin, Wm. Shannon Nelson, Lewis O'Bryan, Robert Buckingham Pasley, Robinson Plato Searson, John Waties Thomas, Geo. Bell Timmerman.
- 1903—Edgar Otis DePass, Samuel Capers DePass, Clifton Dudley DuBose, Godfrey Herman Geiger, Norman Bruce Gillard, Malcolm Paul Harris, Wm. Walker Hawes, Geo. McCutchen, Julian Booth Salley, William

- Munroe Shand, Simeon Ernest Smith, Adolphus Fletcher Spigner, David Reece Williams.
- 1904—Richard Baker Belser, Chas. Edward Commander, Claude Browne Earle, Ralph Dickson Epps, Chas. Laudie Hunley, Henry Lee Kennedy, Geo. Davis Levy, Marvin McAlister Mann, Laurens Tenny Mills, McHardy Mower, Robert Howell Singletary.
- 1905—David Gordon Baker, James Edwin Belser, Frederick Charles Bigby, James Moncrief Brailsford, John Kolb Breeden, Jesse Lyles Carter, Jos. James Craig, Talmage Miles Garrett, Albert Eugene Hill, Eddings Thomas Hughes, Samuel Oliver O'Bryan, Benjamin Franklin Pegues, M. Rich, Wm. Pressley Robinson, Geo. Wells Vaughn, John Frederick Williams, John Mahon Wise, John McSwain Woods.
- 1906—John Bratton Sitton Dendy, Stephen Elliott, James Team Gettys, James Capers Hiott, Albert Clifton Hinds, Thos. Minter Lyles, Paul Montgomery Macmillan, Edward Coke Mann, Eugene Stuart Oliver, Albertus Rose Williamson, Benjamin Franklin Wyman.
- 1907—William David Aiken, Jr., R. Pringle Clinkscales, Edward Stockton Croft, Lawrence Edward Croft, Charles E. Early, Charles Mills Galloway, Alfred Lila Hamer, Marvin Hardin, M. Hughes Jerry, Wade C. Hughes, David Hamilton, Dibert Jackson, Walter Scott, Lawrence B. Singleton, Charles Capers Smith, Ashley C. Tobias, Jr.
- 1908—Wm. Anderson Clarkson, Cleland Thomas Cunningham, Edward B. Friday, Plowden D. Graham, Harry Nathaniel Grossman, Edward Henry Henderson, Alva M. Lumpkin, James Edwin McDonald, Jr., John Gates Stabler, John Clarence Townsend, Alfred Wallace, Jr.
- 1909—Thomas McCullough Boulware, Jr., Tolliver Cleveland Callison, James Frank Clinkscales, Charles Jones Colcock, James Frank Eppes, J. Henry Johnson, Jos. Copeland Massey, Philip Alcemus Murray, Jr., G. Gordon McLaurin, Wm. Calhoun Singleton, Roy Webster, Marcellus Seabrook Whaley.

- 1910—Charles Alfred Ashley, Geo. Duncan Bellinger, Jr., Berte Dane Carter, Byron V. Chapman, Curran Earle Cooley, Joseph Fromberg, Claude Jackson Gasque, James Henry Hammond, Monroe Moore McDonald, Thomas Henry Moffatt, Randolph Murdaugh, Geo. Wells Orr, Joseph A. Patla, Geo. Robert Pettigrew, Charles Hartzog Salley, Herbert Lee Smith, Jr.
- 1911—Philip H. Arrowsmith, Capers Gamewell Barr, Samuel Elmer Barron, Rodney Hammond Etheredge, Robert Edward Hanna, Lucius A. Hutson, John Henry Hydrick, Lawrence Alexander Kirkland, John Dozier Lee, Preston Earle Lyles, William Boyce Marion, William Campbell McGowan, Franklin Alexander McLeod, Cromwell Emory Murray, Joseph Murray, Claud Napoleon Sapp, John Julius Pringle Smith, William Maxey Stokes, Thomas Porcher Stoney, James Warren Wide-  
man, John Patrick Wise.
- 1912—George G. Alexander, Jr., Clarence Erwin Black, Frederick William Cappleman, David William Gaston, Jr., Henry Grady Goggans, Luther Ellsworth Guy, Edward Percy Guerard, Jr., Lucius Kelly Jennings, Murdock McNeil Johnson, Alan Johnstone, Jr., Isadore A. Monash, Cordie Page, Robert H. Pittman, John Marion Ross, Charles Eric Sligh, Molton Ancrum Shuler.
- 1913—James Allan, Jr., Enoch Silvis Carroll Baker, Willie Dickson Barnett, Enric Blackwell, James Chester Busbee, Silas Marion Busby, James Drummond Brandenburg, Seaborn Jones Colcock, Geo. Reynolds Congdon, Jr., Paul Anderson Cooper, William Joseph Cordes, John Grasty Crews, James McCants Douglass, Miller Clyde Foster, Clinton Tomkins Graydon, William Wallace Harris, John Shaw Hoey, Thomas Franklin McCord, Moffatt Grier McDonald, Daniel Baker McIntyre, William Campbell McLain, Thomas Sanders McMillan, James Archibald Mace, Walter Arthur Metts, Jr., Walter Bedford Moore, Jr., James Bryson Murphy, Norval Nimmons Newell, Robert Spencer Owens, Frampton Wyman Toole, Alfred Holmes von Kōlnitz, Joseph Carlisle Wrighton, Neal Wells Workman.

Mr. John J. McMahan then made appropriate remarks.<sup>1</sup>

Receiving the portrait in behalf of the Supreme Court, Hon. EUGENE B. GARY, CHIEF JUSTICE, said:

"The custom of giving expression to feelings of love and admiration for those whose lives were characterized by noble deeds has prevailed throughout the world from its earliest history. This may be done by the pen of the poet or historian, the chisel of the sculptor, the skill of the artist and the eloquence of the orator. On this occasion, those who were trained, as it were at the feet of Gamaliel, seek in loving admiration to commemorate the deeds of the distinguished dead by requesting this Court to grant its permission to place upon these walls the portrait which we now behold, and orators in eloquent words fraught with inspiration have told us why he was loved and admired.

"This occasion not only affords an opportunity for honoring the dead, but, likewise, for inspiring the living to emulate his virtues.

"As we sat with pen in hand, thinking what we should say when this handsome and life-like portrait should be presented on this occasion, a striking and grand picture appeared before our mind's eye. We saw a tall and handsome man with hoary locks standing in this court room, looking just as he did when he arose to make a motion for the admission to the Bar of those who had passed successful examinations at the Law School of the University. A sunny smile illuminated his benign and intellectual countenance; and no one could gaze upon such a picture without being impressed with the idea that he was a great man.

"We shall not undertake to give the details of Dr. Pope's eventful life, as this has already been done by others; but will make one or two observations in regard to his career.

"His great influence was due, mainly, to his high character, love of his fellow man, extensive knowledge and his wonderful power of inspiring others. His genius and learning cause us

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<sup>1</sup>The Reporter regrets that he has been unable to procure a copy of Mr. McMahan's remarks, and for that reason they are not included in this report.



to recall the language of Lord Bacon in the first book of 'The Dignity and Advancement of Learning,' in which he says: 'The command of knowledge is higher than the command over a free people, as being a command over the reason, opinion and understanding of men, which are the noblest faculties of the mind that govern the will itself; for there is no power on earth that can set up a throne in the spirits of men but knowledge and learning; whence the detestable and extreme pleasure wherewith arch heretics, false prophets and imposters are transported upon finding they have a dominion over the faith and consciences of men, a pleasure so great that if once tasted scarce any torture or prosecution can make them forego it. But, as this is what the Apocalypse calls the depths of Satan, so the just and lawful rule over men's understanding by the evidence of truth and gentle persuasion is what approaches nearest to the Divine sovereignty.'

"The monuments of genius and learning are far more durable than those of the hand.

"The verses of Homer have continued above 2,500 years without loss, in which time numberless palaces, temples, castles and cities have been demolished and are fallen to ruin. It is impossible to have the true pictures or statues of Cyrus, Alexander, Cæsar or the great personages of much later date, for the originals can not last; but the images of men's knowledge remain in books, exempt from the injuries of time, and capable of perpetual renovation. Nor are these properly called images, because they generate still and sow their deeds in the minds of others so as to cause infinite actions and opinions in succeeding ages.

"The fancy of a poet who has improved an ancient fiction is not inapplicable on this occasion. He feigned that at the end of the thread of every man's life, there hung a medal on which the name of the deceased is stamped, and that Time, waiting upon the shears of the fatal sister, as soon as the thread was cut, caught the medals and threw them out of his bosom into the river Lethe. He also represented many birds flying over its banks, who caught the medals in their beaks and, after carrying them about for a certain time, allowed them to fall in the river. Among these birds were a few swans, who

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used, if they caught a medal, to carry it to a certain temple consecrated to immortality. We trust that when Time cast out of his bosom into the river Lethe the medal upon which was stamped the name of Joseph Daniel Pope it was caught by a swan and carried to the temple consecrated to immortality."

Thereupon the Court adjourned for the day.

## Cases Cited by the Court.

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Alderman etc. Co. v. Wilson, 71 S. C. 64; 50 S. E. 643.	249
Amaker v. New, 33 S. C., 35; 11 S. E. 386; 8 L. R. A.	
687 .....	126, 448
Am. Publishing Co. v. Gibbes, 59 S. C. 215; 37 S. E.	
753 .....	360
Anderson v. Moncrieff, 3 de Saus. 124.....	187
Arnold v. Mathison, 3 Rich. Eq. 153.....	368
Arthur v. Allen, 22 S. C. 432.....	230
A. & C. A. L. Railway Company v. Mfg. Co., 93 S. C.	
405; 76 S. E. 1091.....	448
A. C. L. R. R. C. v. Moise, 85 S. C. 530; 67 S. E. 785.	459
 Babb v. Sullivan, 43 S. C. 441; 21 S. E. 277.....	224
Badham v. Brabham, 54 S. C. 404; 32 S. E. 444....	459
Baker, Ex parte, 67 S. C. 82; 45 S. E. 143.....	224
Baker v. Irvine, 62 S. C. 299; 40 S. E. 672.....	58
Bank v. Mellett, 44 S. C. 386; 22 S. E. 444.....	459
Bank v. Stackhouse, 91 S. C. 455; 74 S. E. 977; 40	
L. R. A. (N. S.) 454.....	54, 55
Barber v. R. R. Co., 34 S. C. 450; 13 S. E. 360.....	428
Bell v. Fludd, 28 S. C. 313; 5 S. E. 810.....	59
Benedict v. Minn. & St. L. R., 86 Minn. 224; 90 N. W.	
360; 57 L. R. A. 639; 91 Am. St. Rep. 345.....	471
Best v. Sanders, 22 S. C. 589.....	231, 232
Biggers v. Catawba Co., 72 S. C. 264; 51 S. E. 882..	409
Birchmore v. Board, 78 S. C. 461; 59 S. E. 145....	6
Black v. Simpson, 94 S. C. 314; 77 S. E. 1024; 46	
L. R. A. (N. S.) 137.....	36
Blackwell v. Ryan, 21 S. C. 112.....	269
Blume v. Ry. Co., 85 S. C. 440; 67 S. E. 546.....	429
Boatwright v. R. R. Co., 25 S. C. 128.....	410
Bornsdroff v. Lord, 41 Barb. 211.....	230

Bouchillon v. Ry. Co., 90 S. C. 42; 72 S. E. 634; Ann. Cases, 1913D 1.....	470
Boyce v. Lake, 17 S. C. 481; 43 Am. Rep. 618.....	224
Brabham v. Tel. Co., 71 S. C. 53; 50 S. E. 716.....	410
Branch v. Ry. Co., 35 S. C. 405; 14 S. E. 808.....	410
Brown v. Bank, 55 S. C. 70; 32 S. E. 816.....	274
Brownlee v. Martin, 21 S. C. 392.....	266
Bryce v. Massey, 35 S. C. 127; 14 S. E. 768.....	231
Buist v. Salvo, 44 S. C. 143; 21 S. E. 615.....	393
Burns v. So. Ry. Co., 63 S. C. 46; 40 S. E. 1018....	430
Cabeen v. Gordon, 1 Hill Eq. 51.....	255
Caldwell v. Duncan, 87 S. C. 331; 69 S. E. 525.....	27
Campbell v. Ry., 94 S. C. 105; 77 S. E. 745.....	152, 160
Carpenter v. Longan, 16 Wall. 271.....	145
Cave v. Ry., 94 S. C. 282; 77 S. E. 1017.....	469
Chenery v. R. R. Co., 160 Mass. 211; 35 N. E. 554; 22 L. R. A. 575.....	438
Childs v. Childs, 93 S. C. 427; 77 S. E. 50.....	334
Clements v. Ins. Co., 101 Tenn. 22; 46 S. W. 561; 42 L. R. A. 247; 70 Am. St. Rep. 650.....	422
Clifford v. Ry. Co., 87 S. C. 324; 69 S. E. 513.....	431
Comm. v. Dennison, 24 How. (U. S.) 97.....	4
Coley v. Coley, 94 S. C. 386; 77 S. E. 49.....	480
Corley v. Ry., 89 S. C. 432; 71 S. E. 1035.....	152
Craig v. R. R. Co., 93 S. C. 49; 76 S. E. 21.....	73
Creswell v. Smith, 61 S. C. 575; 39 S. E. 757.....	274
Crocker v. Collins, 37 S. C. 327; 15 S. E. 951; 34 Am. St. Rep. 752.....	440
Croxton v. Truesdale, 75 S. C. 418; 56 S. E. 45....	5
Culp v. Union, 95 S. C. 131; 78 S. E. 738.....	8
Daughty v. R. R. Co., 92 S. C. 361; 75 S. E. 553....	382
Davenport v. Latimer, 53 S. C. 572; 31 S. E. 633....	276
Davis v. Board, 86 S. C. 461; 68 S. E. 876.....	6
Davis v. R. R. Co., 63 S. C. 370; 41 S. E. 468.....	52
Davis v. R. R. Co., 75 S. C. 307; 55 S. E. 526.....	162
Dearman v. Trimmier, 26 S. C. 506; 2 S. E. 501....	145

Devereaux v. McCready, 46 S. C. 133; 24 S. E. 77...	266
Diercks v. Robertson, 13 S. C. 343.....	349
Dill v. Durham, 56 S. C. 425; 35 S. E. 3.....	57
Dobson v. Receivers, 90 S. C. 415; 73 S. E. 875....	110
Doster v. Tel. Co., 77 S. C. 56; 57 S. E. 671....	387, 388
Dover v. Lockhart, 86 S. C. 229; 68 S. E. 525.....	27
Duncan v. Duncan, 93 S. C. 493; 76 S. E. 1099.....	
Dunlap v. Robinson, 87 S. C. 577; 70 S. E. 313....	
Easterling v. R. R. Co., 91 S. C. 546; 75 S. E. 133....	428
Edgens v. Mfg. Co., 69 S. C. 530; 48 S. E. 538.....	114
Finch v. Finch, 21 S. C. 345.....	241
Flagler v. Atlantic C. L. Co., 89 S. E. 328; 71 S. E.	
849 .....	240
Flood v. News & Courier, 71 S. C. 112; 50 S. E. 637;	
4 Ann. Cases 685.....	328
Francis v. Francis, 78 S. C. 181; 58 S. E. 804.....	275
Fraser & Dill v. Charleston, 11 S. C. 486.....	456
Fuller v. Missroon, 35 S. C. 314; 14 S. E. 714.....	246
Gadsden v. Power Co., 80 S. C. 240; 61 S. E. 960....	413
Garrett v. Herring, 69 S. C. 278; 48 S. E. 254....	58, 59
Ga. R. R. Co. v. Fuller, 6 Ga. App. 456; 65 S. E. 313.	471
Ga. So. & Fla. R. R. v. Murray, 113 Ga. 1021; 39	
S. E. 427.....	472
Gentry v. Lanneau, 54 S. C. 511; 32 S. E. 523.....	147
Germofert Mfg. Co. v. Castles, 97 S. C. 389; 81 S. E.	
665 .....	395, 397
Gill v. Ruggles, 95 S. C. 93; 78 S. E. 536.....	241
Givens v. Carroll, 40 S. C. 413; 18 S. E. 1030; 42	
Am. St. Rep. 889.....	400
Goforth v. Goforth, 47 S. C. 133; 25 S. E. 40.....	448
Good v. Jarrard, 93 S. C. 229; 76 S. E. 698; 43	
L. R. A. (N. S.) 383.....	269
Grady v. Ga. R. R., 112 Ga. 668; 37 S. E. 861.....	471
Gregorie v. Bulow, Rich. Eq. Cases 235.....	268
Gunter v. Gayden, 84 S. C. 45; 65 S. E. 948.....	10, 487

Hale v. R. R. Co., 34 S. C. 299; 13 S. E. 537.....	428
Hankinson v. Ins. Co., 80 S. C. 392; 61 S. E. 905..	379
Hankinson v. R. R. Co., 41 S. C. 20; 19 S. E. 206 .....	428, 436, 437
Hartford Ins. Co. v. Unsell, 144 U. S. 439; 12 Sup. Ct. 671; 36 L. Ed. 496.....	379
Hicks v. Ry. Co., 63 S. C. 559; 41 S. E. 753.....	410
Holley v. Anness, 41 S. C. 354; 19 S. E. 646.....	255
Holliday v. Pegram, 89 S. C. 73; 71 S. E. 367; Ann. Cases, 1913A 33.....	203
Holzclaw v. Green, 45 S. C. 494; 23 S. E. 515.....	291
Hughes v. Shingle Co., 51 S. C. 1; 28 S. E. 2....	201, 459
Hunt v. Smith, 3 Rich. Eq. 484.....	223
Hurst v. Craig Furniture Co., 95 S. C. 221; 78 S. E. 960 .....	201
Ingram v. Sumter Music House, 51 S. C. 282; 28 S. E. 936.....	151
Izard v. Izard, 8 S. C. Eq. (Bail. Eq.) 234.....	124
Izlar v. Ry. Co., 57 S. C. 332; 35 S. E. 583.....	439
Jackson v. Plyer, 38 S. C. 499, 500; 17 S. E. 255; 37 Am. St. Rep. 782.....	126, 147, 448
Jenkins v. R. R. Co., 84 S. C. 344; 66 S. E. 409..	58, 59
Johns v. R. R., 133 Ga. 525; 66 S. E. 269.....	471
Jones v. Lumber Co., 92 S. C. 418; 75 S. E. 698....	251
Jones v. R. R. Co., 70 S. C. 217; 49 S. E. 568.....	432
Jumper v. Bank, 39 S. C. 296; 17 S. E. 980.....	291
Keene v. La Farge, 16 How. (Prac.) 377.....	230
Kendall v. Stokes, 3 How. (U. S.) 100.....	4
Kendall v. U. S., 12 Pet. 615.....	4
Kennedy v. Smith, 2 Bay 414.....	223
Kiddell v. Bristow, 67 S. C. 180; 45 S. E. 174.....	151
Kirby v. R. R. Co., 63 S. C. 494; 41 S. E. 765.....	428
Kirkland v. Ry. Co., 93 S. C. 574; 77 S. E. 709....	382
Kirven v. Chem. Co., 77 S. C. 493; 58 S. E. 424; 215 U. S. 252; 30 Sup. Ct. 78; 54 L. Ed. 179.....	393

Kline v. Nat. Ben. Assn., 111 Ind. 462; 11 N. E. 620; 60 Am. Rep. 703.....	422
Lake v. Shumate, 20 S. C. 23.....	276
Lamb v. R. R. Co., 86 S. C. 106; 67 S. E. 958; 138 Am. Stat. Rep. 1030.....	430
Langston v. Shands, 23 S. C. 152.....	223
Lawton v. Ry., 61 S. C. 548; 39 S. E. 752.....	236, 237
Lee v. Ry. Co., 84 S. C. 125; 65 S. E. 1031.....	429
Levister v. R. R. Co., 55 S. C. 508; 35 S. E. 307..	37, 36
Lewis v. Building Co., 87 S. C. 213; 69 S. E. 213....	411
Lindsay v. So. Ry., 114 Ga. 896; 41 S. E. 46....	471, 472
Little v. Barksdale, 81 S. C. 392; 63 S. E. 208.....	7
Lord v. Bates, 48 S. C. 95; 26 S. E. 213.....	3
Lyle v. Bradford, 7 T. B. Mon. 115.....	230
Lyles v. Williams, 96 S. C. 280; 80 S. E. 470.....	374
Lynch v. Hancock, 14 S. C. 66.....	203
Lyon v. Ry. Co., 77 S. C. 336; 58 S. E. 12.....	411
Matthews v. Ry., 67 S. C. 499; 46 S. E. 335; 65 L. R. A. 286.....	429, 437, 439, 440
Mack v. R. R. Co., 52 S. C. 323; 29 S. E. 905; 40 L. R. A. 679; 68 Am. St. Rep. 913.....	67
McCarty v. Ins. Co., 81 S. C. 152; 63 S. E. 1; 18 L. R. A. (N. S.) 729.....	381
McConnell v. Kitchens, 20 S. C. 430; 47 Am. Rep. 845 .....	361
McGee v. Jones, 34 S. C. 153; 13 S. E. 326.....	448
McGill v. Ry., 75 S. C. 177; 55 S. E. 216.....	174, 177
McGrath & Byrum v. Barnes, 13 S. C. 328; 36 Am. Rep. 687.....	203
Madden v. Ins. Co., 70 S. C. 295; 49 S. E. 855.....	379
Marthinson v. McCutchen, 84 S. C. 256; 66 S. E. 120.	255
Martin v. Guano Co., 72 S. C. 227; 51 S. E. 680....	411
Mason v. Ry. Co., 58 S. C. 74; 13 S. E. 440; 53 L. R. A. 913; 79 Am. St. Rep. 826.....	457
Mass. Ben. Life Assn. v. Robinson, 104 Ga. 256; 30 S. E. 918; 42 L. R. A. 261.....	4262

Mauldin v. Greenville, 33 S. C. 1; 11 S. E. 484.....	5
Mayo's Estate, 60 S. C. 401; 38 S. E. 634; 54 L. R. A. 660 .....	29
Midland Timber Co. v. Prettyman, 93 S. C. 13; 75 S. E. 1012.....	253
Miller v. Ry. Co., 95 S. C. 471; 79 S. E. 645.....	382
Mitchell v. Pinckney, 13 S. C. 212.....	246
Mood v. Tel. Co., 40 S. C. 524; 19 S. E. 67.....	416
Morgan v. Livingston, 2 Rich. 585.....	241
Moseley v. Witt, 79 S. C. 143; 60 S. E. 520.....	277
Muller v. Wadlington, 5 S. C. 342.....	203
Murray v. State Mut. Life Ins. Co., 22 R. I. 524; 48 Atl. 800; 53 L. R. A. 743.....	422
Myers v. Ry. Co., 64 S. C. 514; 42 S. E. 598....	152, 160
Nicholson v. Villepigue, 91 S. C. 234; 74 S. E. 506..	132
Norfolk Lumber Co. v. Smith, 150 N. C. 253; 63 S. E. 954.....	249
Norris v. Ins. Co., 57 S. C. 358; 35 S. E. 572.....	379
Padgett v. Cleveland, 33 S. C. 339; 11 S. E. 1069....	200
Parler v. Fogle, 78 S. C. 570; 59 S. E. 707.....	7
Parnell v. Maner, 16 S. C. 348.....	229, 232
Patterson v. Central R. R., 85 Ga. 654; 11 S. E. 872 .....	473, 471
Patterson v. Rabb, 38 S. C. 138; 17 S. E. 463...145,	299
Peake v. Young, 40 S. C. 41; 18 S. E. 237.....	269
Pearlstine v. Ins. Co., 70 S. C. 82; 49 S. E. 6.....	379
Pedersen v. Del. & L. W. Ry. Co., 229 U. S. 146; 33 Sup. Ct. 648; 57 L. Ed. 1125.....	52
People v. Gallagher, 93 N. Y. 438; 45 Am. Rep. 232..	328
Pendleton v. Fay, 3 Paige 205.....	230
Person v. Fort, 64 S. C. 508; 42 S. E. 594.....	224
Petty v. Petty, 52 S. C. 54; 29 S. E. 406.....	368
Pierson v. Green, 69 S. C. 559; 48 S. E. 624.....	393
Plessy, Ex parte, 45 La. Ann. 80; 11 So. 948; 18 L. R. A. 639.....	330



Plessy v. Ferguson, 163 U. S. 537; 16 Sup. Ct. 1138; 41 L. Ed. 256.....	329
Powers v. Oil Co., 53 S. C. 360; 31 S. E. 276.....	151
Ransom v. Anderson, 9 S. C. 438.....	393
Rawl v. McCown, 97 S. C. 1; 81 S. E. 959.....	487
Rawls v. Am. Central Ins. Co., 94 S. C. 299; 77 S. E. 1013; 45 L. R. A. (N. S.) 463.....	195
Ray v. Counts, 82 S. C. 555; 64 S. E. 1135.....	274
Reed v. Ry. Co., 37 S. C. 53; 16 S. E. 291.....	30
Reese v. Holmes, 5 Rich. Eq. 571.....	255
Richardson v. Ry. Co., 71 S. C. 444; 51 S. E. 444....	152
Riggs, Ex parte, 52 S. C. 298; 29 S. E. 645.....	12
Risinger v. Ry. Co., 59 S. C. 429; 38 S. E. 1.....	428
Roberts v. City of Boston, 3 Cush. 198.....	330
Rountree v. Ingle, 94 S. C. 236; 77 S. E. 931; 45 L. R. A. (N. S.) 776.....	187, 188
Scarborough v. Harris, 1 Bay 178; 1 Am. Dec. 609..	348
Settlemyer v. So. Ry., 91 S. C. 147; 74 S. E. 137 .....	86, 87, 106
Shubrick v. Adams, 20 S. C. 49.....	224
Silcox v. Jones, 80 S. C. 484; 61 S. E. 948.....	58
Sims v. Davis, Cheves 1, 34 Am. Dec. 581.....	436
Sims v. Davis, 70 S. C. 374; 49 S. E. 872.....	232
Sims v. Steadman, 62 S. C. 300; 40 S. E. 677...275.	401
Simmons v. Ry., 120 Ga. 225; 47 S. E. 570; 1 Ann. Cases 777.....	471, 474
Singleton v. Singleton, 60 S. C. 235; 38 S. E. 462....	299
Smith v. Ry. Co., 88 S. C. 421; 70 S. E. 1057; 34 L. R. A. (N. S.) 708.....	152, 160
Smith v. Smith, 50 S. C. 54; 27 S. E. 545.....	394
So. Phos. Co. v. Arthurs, 97 S. C. 358; 81 S. E. 663..	392
So. Ry. Co. v. Beaudrot, 63 S. C. 266; 41 S. E. 299..	440
So. Ry. Co. v. Nappier, 138 Ga. 32; 74 S. E. 778....	471
Stack v. Haigler, 90 S. C. 320; 73 S. E. 354.....	372
Standard Co. v. Henry, 43 S. C. 17; 20 S. E. 790....	393

State v. Angel, 93 S. C. 155; 76 S. E. 195.....	27
Board, 86 S. C. 455; 68 S. E. 676.....	487
Cantey, 2 Hill 614.....	326
Jones, 86 S. C. 17; 67 S. E. 160.....	27
Norton, 69 S. C. 454; 48 S. E. 464.....	388
Rhodes, 44 S. C. 325; 21 S. E. 807; 22 S. E.	
306 .....	85
Shelton, 77 S. C. 74; 57 S. E. 1111.....	39
Whitesides, 30 S. C. 561; 9 S. E. 661.....	4
Williams, 32 S. C. 123; 10 S. E. 876.....	452
State <i>ex rel.</i> Hoover, 39 S. C. 307; 17 S. E. 752....	4
State Bank v. Cox Co., 11 Rich. Eq. 344; 78 Am.	
Dec. 458.....	456
Stoddard v. Hill, 38 S. C. 385; 17 S. E. 138.....	143
Straub v. Screven, 19 S. C. 445.....	204
Strother v. R. R. Co., 47 S. C. 375; 25 S. E. 272.428,	436
Sumter v. Hogan, 96 S. C. 302; 80 S. E. 497.....	388
Sundy's Case, 96 Ga. 819; 23 S. E. 841.....	473
Tharin v. Seabrook, 6 S. C. 113.....	393
Thompson v. Ins. Co., 63 S. C. 297; 41 S. E. 464....	380
Thompson v. R. R. Co., 81 S. C. 338; 62 S. E. 396...	111
Tittle v. Kennedy, 71 S. C. 1; 50 S. E. 544; 4 Ann.	
Cases 68.....	395
Tollerson v. Ry. Co., 88 S. C. 7; 70 S. E. 311....152,	160
Touchberry v. Ry., 87 S. C. 415; 69 S. E. 877.....	237
Trimmier v. Ry. Co., 81 S. C. 211; 62 S. E. 209....	410
Tucker v. Ry. Co., 51 S. C. 306; 28 S. E. 943.....	291
Turner v. Foreman, 47 S. C. 33; 24 S. E. 989.....	459
Virginia-Carolina Chem. Co. v. Hunter, 84 S. C. 214;	
66 S. E. 177; 94 S. C. 65; 77 S. E. 751.....	32
Virginia-Carolina Chemical Co. v. Moore, 61 S. C.	
166; 39 S. E. 346.....	203
Wagner v. Sanders, 62 S. C. 73; 39 S. E. 950....215,	224
Waldrop v. Ga. R. R., 7 Ga. App. 342; 66 S. E. 1030..	470
Walker & Trenholm v. Kee, 16 S. C. 76.....	269

Walker, Evans & Cogswell Co. v. Bollman Bros., 22 S. C. 512.....	147
White v. Tax Collector, 3 Rich. 136.....	327
Whitmire v. Boyd, 53 S. C. 315; 31 S. E. 306.....	269
Whitmire v. Wright, 22 S. C. 453.....	128
Williams v. Hatcher, 95 S. C. 49; 78 S. E. 615.....	60
Williams v. McManus, 90 S. C. 490; 73 S. E. 1038, .....	274, 368
Williams & Co. v. Paysinger, 15 S. C. 171.....	299
Williams v. Salmond, 79 S. C. 459; 61 S. E. 79....	203
Williams v. So. Ry., 11 Ga. App. 313; 75 S. E. 572..	471
Willoughby v. Ry. Co., 52 S. C. 175; 29 S. E. 629...	459
Wilson & Co. v. Dean, 21 S. C. 327.....	203
Wilson v. Kelly, 16 S. C. 216.....	126
Woodmen v. Means, 87 S. C. 127; 69 S. E. 85.....	459
Wright v. Board, 76 S. C. 574; 57 S. E. 536..6, 13,	487
Wright v. Eaves, 10 Rich. Eq. 382.....	203
Wright v. Mut. Ben. Assn., 43 Hun. 61; 118 N. Y. 237; 23 N. E. 186; 6 L. R. A. 731; 16 Am. St. Rep. 749.....	422
Wylie v. Bank, 63 S. C. 419; 41 S. E. 504.....	459

# Statutes Cited by the Court.

## STATE CONSTITUTION.

1868, Art. IV, Sec. 24 .....	57
1895, II, 4 .....	9
II, 5 .....	9
II, 8 .....	9
III, 17 .....	212
III, 33 .....	325
V, 23 .....	57, 60
V, 26 .....	126
XI, 7 .....	325

## CIVIL CODE 1912.

Sec. 208 .....	9, 10
213 .....	9
236 .....	11
1761 .....	321, 323, 331
1780 .....	325
1947 .....	107, 108
2322 .....	360
2722, 2723 .....	421
2963 .....	29
3098 to 3316 .....	383, 384
3226 .....	47
3222 .....	423, 426, 436, 383
3230 .....	423, 426, 436
Statute of Elizabeth as to Assignments.	
Civil Code, secs. 3455 to 3459 .....	147
3833 .....	459
3955 to 3956 .....	29
4106 .....	400

## CODE CIVIL PROCEDURE.

Sec. 172, 176 .....	57
174 .....	444

Sec. 199	372
203	377
209	423, 428
210	392
218	29
298	475
310	372
326	372
438	266

## CRIMINAL CODE.

Sec. 84	452
372	7
385	325
492	450
494	450
497	450

## STATUTES AT LARGE.

16 Stats. 530	421
26 Stats. 945 as to highways in Marion, 1910	
	207, 210
27 Stats. 737 as to automobiles	173

## GEORGIA CODE.

Sec. 4426	473
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# INDEX.

## ABATEMENT OF ACTIONS.

*See Death by Wrongful Act. Bennett v. Spartanburg etc. Ry. Co.*, 81 S. E. 189, 97 S. C. 21.

## ADVERSE POSSESSION.

1. The testimony tending to show defendants claimed title from a common source with, but adversely to, plaintiffs, the issue as to adverse possession was properly submitted to the jury. *Dunlap v. Robinson*, 81 S. E. 428, 97 S. C. 79.

## APPEAL AND ERROR.

1. An order of the Circuit Court granting a new trial on appeal from a magistrate's Court is not appealable, where it does not appear that the decision was influenced by any error of law, or that the Supreme Court could render judgment absolute if no error was committed in granting the new trial. *Eaker v. Floyd*, 81 S. E. 656, 97 S. C. 381.
2. Where the Court entered two decrees at different times, but the first decree merely adjudicated the rights of the parties and directed the preparation of a final decree, a notice of intention to appeal, served within ten days of notice of filing of the formal decree, was in time. *Dinkins v. Simons*, 81 S. E. 638, 97 S. C. 261.
3. In absence of a showing by the record that defendant, in an action for slander, requested a charge that plaintiff could only recover actual damages for constructive malice, but may recover punitive damages for actual malice, error in not giving such a charge cannot be considered on appeal. *Smith v. Brown*, 81 S. E. 633, 97 S. C. 239.
4. Under Code Civ. Proc. 1912, sec. 203, providing that, where an

answer contains new matter constituting a defense by way of avoidance, the Court may, in its discretion, on defendant's motion, require a reply thereto, the trial Court's discretion will not be interfered with, in the absence of prejudicial abuse. *Powell v. Continental Ins. Co., of City of New York*, 81 S. E. 654, 95 S. C. 375.

5. The judgment will not be reversed because of any errors which are not shown to have been prejudicial to appellant's rights. *Eleazer v. Shealy*, 81 S. E. 648, 97 S. C. 335.
6. Where there was no contest as to the existence of a fact, error, if any, in admitting secondary evidence to prove the fact was not prejudicial. *Carolina Nat. Bank of Columbia v. City of Greenville*, 81 S. E. 634, 97 S. C. 291.
7. Error in an instruction, as being on the facts, that in slander statements by defendant derogatory to plaintiff's character, made at other times than those alleged, are competent on the question of malice, "and shows express malice," could not have misled the jury. *Smith v. Brown*, 81 S. E. 633, 97 S. C. 239.
8. A judgment granting specific performance of an option contract to purchase real estate, and directing a sale to pay the amount due the vendor, affirmed by an equally divided Court. *Dinkins v. Simons*, 81 S. E. 638, 97 S. C. 261.
9. An answer to a complaint for the possession of land conveyed by defendant to plaintiff, which admitted the execution of a deed, but alleged that it was intended as a mortgage, and not an absolute conveyance, raised an equitable issue, upon which the findings by the trial Court can be

- reviewed. *Banks v. Frith*, 81 S. E. 677, 97 S. C. 362.
10. Defendant's consent to a verdict, after the Court had ruled that he could not introduce evidence in support of his defense, was not voluntary so as to deprive him of his right to review such ruling on appeal. *Southern States Phosphate Co. v. Arthurs*, 81 S. E. 663, 97 S. C. 958.
  11. A telegraph company, when sued for delay in the delivery of a message, may not complain of the defect in the complaint whereby evidence to prove notice that special damages would result from delay is set out instead of the allegation of notice. *Simkins v. Western Union Telegraph Co.*, 81 S. E. 657, 97 S. C. 413.
  12. Where the evidence did not entitle plaintiff to recover, under the crossing signal act (Civ. Code, secs. 3222, 3230), which allows such recovery unless the plaintiff was grossly or wilfully negligent, a charge submitting the case to the jury as a case under the statute was prejudicial. *Sanders v. Southern Ry. Co.—Carolina Division*, 81 S. E. 786, 97 S. C. 423.
  13. Where there was no evidence that plaintiff was entitled to use a path along a railroad right of way, which he was using at the time of his injury, an instruction submitting to the jury the question whether he had a right to be on such path was prejudicial as authorizing the jury to find that he was legally entitled to be there, and as failing to submit to them the issue whether he was a licensee or a trespasser. *Sanders v. Southern Ry. Co.—Carolina Division*, 81 S. E. 786, 97 S. C. 423.
  14. Case on appeal should not include testimony irrelevant to questions raised by exceptions. *Settlemyer v. So. Ry.—Carolina Division*, 81 S. E. 465, 97 S. C. 85; *Turner v. F. W. Poe Mfg. Co.*, 81 S. E. 430, 97 S. C. 112.
  15. A party requesting a charge on an issue cannot complain of the absence of any evidence on the issue. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.
  16. Refusal of a new trial on the ground of the insufficiency of the evidence will not be disturbed on appeal, in the absence of any abuse of discretion. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.
  17. Where it appears from the exceptions that the trial Court and the attorneys understood that the objection to a certain line of testimony was to continue throughout the trial, it was not necessary to repeat the objection every time similar evidence was offered. *Gill v. Ruggles*, 81 S. E. 519, 97 S. C. 362.
  18. An exception to the admission of irrelevant evidence will be overruled, without determining whether such ruling was erroneous, where it does not appear that the ruling was prejudicial to appellant. *Gill v. Ruggles*, 81 S. E. 519, 97 S. C. 362.
  19. Exceptions to the refusal to direct a verdict cannot be sustained, even though the testimony tending to prove the allegations of the complaint was erroneously ruled to be competent. *Gill v. Ruggles*, 81 S. E. 519, 97 S. C. 362.
  20. Upon appeal from such erroneous rulings a new trial will be granted; but the Supreme Court will not order a nonsuit. *Gill v. Ruggles*, 81 S. E. 519, 97 S. C. 362.
  21. Exceptions which refer to facts to be found elsewhere than in the exceptions themselves are insufficient in form, and cannot be considered. *Gill v. Ruggles*, 81 S. E. 519, 97 S. C. 362.
  22. The general rule that questions which were not raised in the trial Court will not be considered on appeal will not be applied in a criminal case tried before a magistrate, where the warrant charges no offense against the law, and there is a total failure of proof of any crime, not merely as to some immaterial particular or particulars, but in respect to matters which go to

- the foundation of the offense alleged, or attempted to be alleged, and proved. *State v. Williams*, 81 S. E. 154, 97 S. C. 449.
23. An exception to the overruling of an objection to a question asked a witness must be overruled, where the question was not answered. *Watkins v. A. C. L. R. R. Co.*, 81 S. E. 426, 97 S. C. 148.
  24. A point not made in the trial Court, in the motion for nonsuit or for a directed verdict, or a requested charge not pleaded, is not available on appeal. *Watkins v. A. C. L. R. R. Co.*, 81 S. E. 426, 97 S. C. 148.
  25. An exception that the trial Judge failed to charge additional propositions of law, which were not requested, presents no error. *State v. Newman*, 81 S. E. 667, 97 S. C. 441.
  26. An exception to a charge, failing to show what the charge was, will not be considered. *State v. Newman*, 81 S. E. 667, 97 S. C. 441.
  27. In a prosecution for aggravated assault and battery, an exception to a charge on the law of mutual combat, not shown to have been prejudicial to the rights of defendants, was not ground for reversing a conviction. *State v. Newman*, 81 S. E. 667, 97 S. C. 441.
  28. The failure of the Court to construe deeds in the chain of title of the plaintiff, in an action for unlawful entry on land, and for possession, was not error, where it did not appear that such construction was necessary, and it was not requested. *Nicholson v. Villepigue*, 81 S. E. 494, 97 S. C. 130.
  29. The Supreme Court, on appeal from an order of nonsuit at the close of plaintiff's case, had no jurisdiction to determine the facts so as to conclude the Court on a new trial. *Nicholson v. Villepigue*, 81 S. E. 494, 97 S. C. 130.
  30. A charge although erroneous because on the facts, held not prejudicial in case at bar. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.
  31. Charge held unprejudicial in view of undisputed evidence in case. *Settlemyer v. So. Ry.—Carolina Division*, 81 S. E. 465, 97 S. C. 85.
- ### ASSAULT AND BATTERY.
1. In a prosecution for aggravated assault and battery, an exception to a charge on the law of mutual combat, not shown to have been prejudicial to the rights of defendants, was not ground for reversing a conviction. *State v. Newman*, 81 S. E. 667, 97 S. C. 441.
- ### ASSIGNMENTS.
- See Mortgages.*
1. An assignment of a chose in action is not within the recording acts and is valid though not recorded. *Carolina Nat. Bank of Columbia v. City of Greenville*, 81 S. E. 634, 97 S. C. 291.
  2. Where an assignment authorized the assignee to apply funds in a specified manner, the trustee in bankruptcy of the assignor could not complain because the assignee so applied the funds. *Carolina Nat. Bank of Columbia v. City of Greenville*, 81 S. E. 634, 97 S. C. 291.
  3. In a suit to recover a bond and mortgage which plaintiff had assigned to a third person, evidence held to show that the defendant bank, which lent money on the security of the bond and mortgage, was a purchaser in good faith without notice of the agreement between plaintiff and her assignee. *Anderson v. Citizens Bank*, 81 S. E. 158, 97 S. C. 453.
  4. Where the owner of a nonnegotiable bond and mortgage assigned it, the assignment being recorded, a bona fide purchaser without notice from the assignee is protected; the mortgagee being estopped to assert her rights. *Anderson v. Citizens Bank*, 81 S. E. 158, 97 S. C. 453.
  5. The assignment. "For value received, I hereby transfer all my



rights and title to the within note and mortgage, \* \* \* without recourse," is sufficient in form to transfer the assignor's interest as mortgagee in the insurance on the mortgaged property. *Rawls v. American Cen. Ins. Co.*, 81 S. E. 505, 97 S. C. 189.

6. The consideration in an assignment being stated to be "value received," parol evidence is admissible to show the true consideration. *Rawls v. Am. Cen. Ins. Co.*, 81 S. E. 505, 97 S. C. 189.

### ASSUMPTION OF RISKS.

*See Master and Servant.*

### ATTACHMENT.

1. Where buyer of mule, for which he had not paid, exchanged it with the seller for another mule, paying the difference in cash, debt due *held* to be for the purchase price of the second mule, and it could be attached, in an action for the debt, and sold to satisfy the judgment. *Hartzog-Hagood Live Stock & Vehicle Co. v. Wilson*, 81 S. E. 180, 97 S. C. 475.

### ATTORNEYS AT LAW.

1. The soliciting of business by an attorney at law in an unprofessional manner, his acceptance of a fee and subsequent desertion of his client, and the possession of a reputation for truth and integrity unworthy of a member of the bar, shows him to be unfit to practice as such attorney, and authorizes his indefinite suspension, with privilege to move for reinstatement after a prescribed period, on proof of reformation and possession of proper qualifications. *In re Sims*, 81 S. E. 279, 97 S. C. 37.
2. Where a note and mortgage, providing for attorneys' fees if placed in the hands of attorneys for collection, were placed in attorneys' hands before the date to which the time of payment had been extended and before such date the amount due was

tendered, a Court of equity which has control of such contracts for attorneys' fees would deny a recovery of such fees. *Taylor v. King*, 81 S. E. 172, 97 S. C. 477.

### BILLS AND NOTES.

1. When a mortgage note is payable to bearer, the statement of his ownership by one in possession of it, which itself is *prima facie* evidence of ownership, is all that is necessary to sustain action thereon. *Talbert v. Talbert*, 81 S. E. 644, 97 S. C. 136.
2. Where the testimony of plaintiff that it is a holder for value in due course of business before maturity of a negotiable instrument, without notice of any fraud or infirmity affecting it, is undisputed, and only one inference can be drawn therefrom; verdict was properly directed in its favor. *New England Nat. Bank v. Wallace*, 80 S. E. 460, 97 S. C. 52.
3. In an action by the purchaser of land at a judicial sale, claimed to have been paid for by giving a check to defendant clerk of Court, which he failed to diligently present for payment before the bank had become insolvent, to compel defendant to make title to the land to plaintiff, evidence *held* to sustain a finding that the clerk received the check to collect it for plaintiff, and not as payment, and that he made reasonable efforts to collect the check. *Eleazer v. Shealy*, 81 S. E. 648, 97 S. C. 335.

### CANCELLATION OF INSTRUMENTS.

1. A grantor conveying to an electric railroad company land on which to build its road, with the right to make necessary cuts and fills, cannot, without tendering back the price paid, maintain an action for fraud based on the company's representation that its road would run at grade, while it made a cut of eight or

ten feet. *Cochran v. Greenville etc. Ry. Co.*, 81 S. E. 191, 97 S. C. 34.

2. Where a life policy provided that it should be incontestable, except for nonpayment of premiums, after one year from date, the insurer, after the expiration of the year, could not maintain a suit against the insured and the beneficiary to cancel the policy for the defendant's alleged fraud in procuring it. *Philadelphia Life Ins. Co. v. Arnold*, 81 S. E. 654, 97 S. C. 418.

#### CARRIERS.

1. A carrier is bound to furnish passengers with seats. *Talbert v. Charleston & W. C. Ry. Co.*, 81 S. E. 182, 97 S. C. 475.
2. A carrier under contract is bound to furnish passengers with seats, and, for reckless indifference of a carrier as to the duty of furnishing seats for passengers, it is liable for punitive damages. *Talbert v. Charleston & W. C. Ry. Co.*, 81 S. E. 182, 97 S. C. 475.
3. Where a boy 19 years old left the inside of a passenger coach, where he had standing room, and went out on the platform, and was injured while swinging out from the lower step by being struck by a car standing on a sidetrack, he was guilty of contributory negligence. *Talbert v. Charleston & W. C. Ry. Co.*, 81 S. E. 182, 97 S. C. 475.
4. Though the negligence of a carrier in failing to provide seats compelled a passenger to stand upon the platform, yet where the passenger went to the lower step, swinging out and looking backwards, and was struck by a car standing upon a sidetrack, he could not recover. *Id.*, 81 S. E. 182, 97 S. C. 475.
5. Where a passenger, while standing upon the bottom step of a passenger coach and swinging out beyond the line of cars and looking backwards, was struck by a car on a sidetrack, the proximate cause of the injury

was his own contributory negligence. *Talbert v. Charleston & W. C. Ry. Co.*, 81 S. E. 182, 97 S. C. 475.

6. Where a passenger informed the conductor that he had purchased a ticket to a certain point, but that the agent negligently gave him a ticket to a nearer point, it was the duty of the conductor to heed the explanation and investigate its truth; and, if he ejected the passenger, and the explanation later turned out true, the carrier would be liable. *Teddars v. So. Ry. Co.*, 81 S. E. 474, 97 S. C. 158.
7. When a dispute arises between a railroad conductor and passenger as to the ticket or fare, it is the duty of each to give all information to the other that each possesses to aid in the settlement of the dispute, and to give heed to reasonable explanations of the other. *Teddars v. So. Ry. Co.*, 81 S. E. 474, 97 S. C. 158.

#### CERTIORARI.

1. *Certiorari* has lost its prerogative character, and may be used in the enforcement of private rights, in which case the State is not a necessary party, and may in such cases be maintained, even though the Attorney General refuses to consent to the use of the State's name. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.
2. Citizens and taxpayers of a county are entitled to maintain *certiorari* to review the decision of the canvassing board in a contested election on the liquor question, without showing special damages differing in kind from those which the public generally will sustain. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.
3. A contention that citizens and taxpayers of a county are not injured by the illegal establishment of a liquor dispensary because the debts of such dispensary are State and not county debts, and therefore such citizens cannot petition for *certiorari* to review the canvass of the

election on such question, is unsound. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.

4. Where the State board of canvassers found that two members of the county board, who were noticeably under the influence of liquor during the canvass of an election on the liquor question, were not so drunk as to incapacitate them, and that finding was supported by the evidence, it cannot be reviewed on *certiorari*. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.

5. On *certiorari*, the Supreme Court will not review findings of fact of an inferior body or Court, unless they are wholly unsupported by evidence. *Jennings v. McCown*, 81 S. E. 963, 97 S. C. 454.

#### CHARGE TO JURY.

1. An instruction that where it is a motorman's duty to keep a lookout for licensees, he cannot excuse his negligence thereof by showing at the time of the injury that his attention was on another duty, for the question remained whether at the time of the injury he was exercising due diligence to keep a lookout ahead, *held* not on the facts. *Kirkland v. Augusta-Aiken Ry. & Electric Corporation*, 81 S. E. 306, 97 S. C. 61.
2. An instruction, in an action for intestate's death by being struck by a street car while in a helpless condition on the track, *held* not objectionable as a charge on the facts or otherwise. *Id.*, 81 S. E. 306, 97 S. C. 61.
3. Where intestate, when struck by a street car, was at least a licensee, so that the company owed him a duty to look out for him, if, in an action for his death, the company desired a charge on intestate's right to occupy the street car track on the theory that he had gotten outside the public highway when struck, it should have requested such a charge. *Kirkland v. Augusta-Aiken Ry. & Electric*

*Corporation*, 81 S. E. 306, 97 S. C. 61.

4. Instructions given in an action for death by being struck by a street car *held* to have sufficiently submitted contributory negligence as a proximate cause of his death, so that requested charges on contributory negligence were properly refused. *Kirkland v. Augusta-Aiken Ry. & Electric Corporation*, 81 S. E. 306, 97 S. C. 61.
5. An instruction that, in an action for slander, statements made by the defendant, derogatory to plaintiff's character, at other times than those alleged in the complaint, may be shown on the question of malice," and "shows express malice," is objectionable, as being on the facts. *Smith v. Brown*, 81 S. E. 633, 97 S. C. 239.
6. Where the Court, in stating the issues, misstates them, a party must call its attention thereto at the time or he cannot complain. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.
7. Where the issue was whether a wife derived a life estate under a deed to her husband for life, with remainder to her for life, with remainder over to their issue, the error in a charge that the wife did not obtain a life estate until after her husband's death, and that the undisputed proof was that she died first, because on the facts in violation of Const., art V, sec. 26, was not prejudicial. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.
8. After jury had been out about eleven hours, the Court had them brought in, and inquired if they had agreed upon a verdict. The foreman announced they had not, and were rapidly coming to a conclusion when sent for. The Court then advised them of the desirability of reaching a verdict, if they could reasonably and conscientiously do so, and gave an additional charge as to the law with reference to reasonable doubt, and added: "In contemplating the

- question whether or not you are satisfied beyond a reasonable doubt, and I have charged you that you must be satisfied beyond a reasonable doubt before you can write a verdict of guilty, the question arises: What do you believe when you contemplate a reasonable doubt? What do you believe has been proven beyond a reasonable doubt? And, as to that point, and that question, if you will stand on Mt. Olympus, as it were, and stand in the presence of your own personality, you will come to the conclusion that belief is something over which you have no control." *Held*, that the charge was not erroneous. "Belief" is a conviction or assurance of the truth of anything on grounds other than personal observation or experience, which it is the purpose of evidence to induce. *State v. Hough*, 81 S. E. 187, 97 S. C. 24.
9. Where jury has been out for the space of eleven hours, it is not improper for the Court to call them in, and give additional instructions on law as to reasonable doubt, the additional charge being appropriate to the ground of the jury's difference. *State v. Hough*, 81 S. E. 187, 97 S. C. 24.
10. Where there was no evidence that plaintiff was entitled to use a path along a railroad right of way which he was using at the time of his injury, an instruction submitting to the jury the question whether he had a right to be on such path was prejudicial as authorizing the jury to find that he was legally entitled to be there, and as failing to submit to them the issue whether he was a licensee or a trespasser. *Sanders v. So. Ry.—Carolina Division*, 81 S. E. 786, 97 S. C. 428.
11. The Court instructed, in an action for damages for non-delivery of a telegram, that the form of the verdict should be, either that the jury find for plaintiff for so many dollars actual damages, which includes mental anguish, etc., and so many dollars punitive damages, if they also found punitive damages, or that the jury found for defendants, and that, if the jury found both actual and punitive damages, they should keep them separate. *Held*, that the instruction was to the effect that the verdict should indicate the kind of damages to which plaintiff was entitled, and was proper. *Betha v. W. U. Tel. Co.*, 81 S. E. 675, 97 S. C. 385.
12. The Court, in an action for personal injuries to an infant employed as a water boy, may properly warn the jury of the dangers of immaturity and want of experience in determining his guilt of contributory negligence. *Stanton v. Interstate Chemical Co.*, 81 S. E. 660, 97 S. C. 408.
13. A charge, that unless the jury found that a pile of shingles and coal, alleged to be a nuisance endangering travel on a public way, was placed or permitted to remain upon defendant's premises, and under its control, it could not obtain as an element of negligence against it, *held*, not liable to construction that the defendant would be liable if such pile were upon its premises, without reference to negligence and proximate cause; as the jury was also instructed that the defendant would only be liable for damages occasioned by the pile of shingles and coal, if they were negligently placed or left at the locus, and were a proximate cause of the injury. *Settemeyer v. So. Ry.—Carolina Division*, 81 S. E. 465, 97 S. C. 85.
14. Charge held unobjectionable, and not to justify belief by jury that the same evidence may warrant a finding of both negligence and wilfulness. *Settemeyer v. So. Ry.—Carolina Division*, 81 S. E. 465, 97 S. C. 85.
15. *Held*, error to instruct jury that if plaintiff was negligent, but his negligence arose by rea-

son of the defendant negligently placing him in an extremity of danger, then plaintiff's negligence, under such circumstances, would not be contributory negligence. The jury should have inquired whether there was an extremity of danger, and whether plaintiff acted thereunder as a reasonably prudent man would have acted in the same exigency. *Settlemyer v. So. Ry.—Carolina Division*, 81 S. E. 465, 97 S. C. 85.

16. Charge on a hypothetical statement of facts not error, where the jury were instructed that the law so given was not applicable unless they found the facts to exist. *Settlemyer v. So. Ry.—Carolina Division*, 81 S. E. 465, 97 S. C. 85.
17. An irrelevant charge, being harmless, cannot be the basis of an exception. *Settlemyer v. So. Ry.—Carolina Division*.
18. Where the Court charged the jury as to the burden of proof, and, at the request of counsel for the opposite parties, charged as to the preponderance of evidence and the credibility of witnesses, and the whole charge could not have misled the jury as to their power and duty in the case, any trivial or technical errors in the charge are not prejudicial. *Teddars v. So. Ry.—Carolina Division*, 81 S. E. 474, 97 S. C. 153.

#### CHATTEL MORTGAGES.

1. Where the mortgagor, after giving a crop mortgage for the next season, surrendered possession to the real property mortgagee without having planted crops, and the proceeds of the crop raised by the mortgagee together with the proceeds of the land upon foreclosure did not satisfy the real property mortgage, the crop mortgagee has no rights. *Kendrick v. Moseley*, 81 S. E. 652, 97 S. C. 897.

#### CHEQUES.

*See Bills and Notes. Eleazer v. Shealey*, 81 S. E. 648, 97 S. C. 335.

#### CIVIL RIGHTS.

1. In view of Const., art. III, sec. 33, declaring void the marriage of a white person with a negro or mulatto having one-eighth or more negro blood, the child of a union of a white person and one having less than one-eighth negro blood is entitled to exercise all the legal rights of a white man, except those arising from a proper classification, when equal accommodations are afforded. *Tucker v. Blease*, 81 S. E. 668, 97 S. C. 308.
2. Under Civ. Code 1912, sec. 1761, subd. 3, school trustees may suspend children of a white person and one having less than one-eighth negro blood upon providing a school for such children, distinct from the negro and the white schools, notwithstanding Const., art. III, sec. 33, authorizing the marriage of whites and persons having less than one-eighth negro blood, and Const., art. II, sec. 7, and Civ. Code 1912, sec. 1780, relating to separate schools for whites and negroes. *Tucker v. Blease*, 81 S. E. 668, 97 S. C. 308.

#### COLLEGES AND UNIVERSITIES.

*See Landlord and Tenants.*

1. A college was not liable for an injury to a third party caused by its students in connection with the game of baseball; the game not being under college control, or part of the college athletics. *Corley v. American Baptist Home Mission Society*, 81 S. E. 146, 97 S. C. 460.

#### COLORED PERSONS.

1. As to slave marriages. *See Maples v. Spencer*, 81 S. E. 483, 97 S. C. 331.

2. In view of Const., art III, sec. 33, declaring void the marriage of a white person with a negro or mulatto having one-eighth or more negro blood, the child of a union of a white person and one having less than one-eighth negro blood is entitled to exercise all the legal rights of a white man, except those arising from a proper classification, when equal accommodations are afforded. *Tucker v. Blease et al.*, 81 S. E. 668, 97 S. C. 308.
3. While the child of a white person and one having less than one-eighth negro blood is entitled to exercise the rights of a white man, in view of Const., art. III, sec. 33, authorizing the marriage of such persons, school trustees, under Civil Code 1912, sec. 1761, subd. 3, providing that the trustees shall have authority and it shall be their duty to suspend or dismiss pupils when the best interest of the schools make it necessary, may, upon providing a school for children of this class distinct from both the white and negro schools, suspend such child from the white schools when for the best interest of the other white pupils, who would be withdrawn if it were allowed to remain, notwithstanding section 1780, declaring that it shall be unlawful for pupils of one race to attend the schools provided for another, and Const., art. II, sec. 7, providing for separate schools for whites and negroes. *Tucker v. Blease et al.*, 81 S. E. 668, 97 S. C. 308.

#### CONTRACTS.

##### *See Deeds; Mortgages; Pleading.*

1. A contractor suing for money certified by the architects to be due should be nonsuited; the money not being due under the contract when the certificate was given, their letter accompanying the certificate, providing "this certificate is given with the understanding that you are to let W. (the owner) have immediate possession of the house," and he not having given immediate pos-

session. *Dobey v. Watson*, 81 S. E. 658, 97 S. C. 349.

2. A contract for street paving, which stipulates that the contractor guarantees that for five years from the time of final payment he will keep the work in good repair and replace any defective material, does not permit the city, protected by a bond conditioned on the contractor performing the contract, to retain any part of the price to perfect the pavement and keep it in repair for five years from its completion. *Carolina National Bank v. Greenville*, 81 S. E. 684, 97 S. C. 291.
3. Where defendant's intestate, either as agent or as a principal, acting with plaintiff, sold intoxicating liquors supplied by plaintiff in violation of the laws of this State, and collected and received the purchase price therefor, plaintiff could not sue for the balance of the amount so collected, after deducting credits due the intestate, since the test of recovery in such cases is whether there is a legal obligation in favor of the plaintiff separate from the illegal transaction, and requiring no aid from it, and the obligation of the estate could not be separated from the sales by the intestate; the debt resting upon such sales and the account arising therefrom. *Elder Harrison Co. v. Jervey*, 81 S. E. 501, 97 S. C. 185.
4. Under Criminal Code 1912, sec. 492, providing that any person who shall contract with another to render personal services, and shall thereafter fraudulently or with malicious intent fail or refuse to render such service, shall be guilty of a misdemeanor, section 494, making the breach *prima facie* evidence that the violation was fraudulent and malicious, and section 497, providing that the contract may be verbal or in writing, and, if in writing, it shall be witnessed by one or more disinterested persons, and, if, verbal, by at least

two disinterested witnesses, not related by blood or marriage within the sixth degree to either party, where the warrant does not allege and the proof does not show whether the contract was verbal or in writing, or whether it was witnessed, a conviction cannot be predicated thereon. *State v. Williams*, 81 S. E. 154, 97 S. C. 449.

### COURTS.

*See, also, Magistrates; Judges.*

1. Where, in a suit by creditors to set aside a mortgage as fraudulent and for the appointment of a receiver, etc., the referee advised the sale of the property, an order directing its sale was *res judicata* if there was no appeal from the order, so that the propriety of the order of sale could not be subsequently considered in the proceeding, in the absence of a change of conditions. *Virginia-Carolina Chemical Co. v. Hunter*, 81 S. E. 190, 97 S. C. 31.

### CONTRIBUTORY NEGLIGENCE.

1. In an action for damages arising from death in a collision with a street car at night, the Court instructed that, if intestate came to his death through his own negligence plaintiff could not recover, and that, though defendant was negligent, and his negligence concurring with defendant's negligence, contributed as to his injury to any extent as a proximate cause thereof, and without which it would not have happened, plaintiff could not recover, unless defendant acted wilfully or wantonly. The Court further instructed that, while it is the general duty of motormen to exercise ordinary care to avoid injuring persons on the track, it is as much the duty of such persons to exercise reasonable prudence to avoid being injured; so that, if decedent lay down on the tracks in a drunken stupor, or went to sleep thereon, and such acts amounted to negligence, and such negligence concurring with defendant's negligence, "contributed to his injury to any extent as a proximate cause thereof, without which it would not have happened, then plaintiff cannot recover." *Held*, that the instructions sufficiently submitted contributory negligence as a proximate cause of decedent's death, so that further charges requested on contributory negligence were properly refused. *Kirkland v. Augusta-Aiken Ry. etc. Co.*, 81 S. E. 306, 97 S. C. 61.
2. The Court instructed, in an action for decedent's death from being struck by a street car, that, while a drunken person would not be run over unless he went on a track, yet the fact that one is on the track at a public crossing in an apparently helpless condition need not necessarily be contributory negligence, since, if that were the law, then no apparently helpless person, from drink or other cause, on a railway track could recover damages; that the law does not prevent one in such case from recovering, even though his condition be due to his own negligence, if the jury further believe that, notwithstanding such negligence, the motorman could have avoided the injury by exercising due diligence in keeping a reasonable outlook ahead, so as to discover him in time to avoid injuring him, but failed to do so, then, if the motorman's neglect, and not the negligence of the person injured, was the proximate cause of the injury, the company would be liable. *Held*, that the instruction was not erroneous as a charge on the facts or otherwise. *Kirkland v. Augusta-Aiken Ry. etc. Co.*, 81 S. E. 306, 97 S. C. 61.
3. *Held*, error to instruct jury that if plaintiff was negligent, but his negligence arose by reason of the defendant negligently placing him in an extremity of danger, then plaintiff's negligence, under

- such circumstances, would not be contributory negligence. The jury should have inquired whether there was an extremity of danger, and whether plaintiff acted thereunder as a reasonably prudent man would have acted in the same exigency. *Settlemyer v. So. Ry.—Carolina Division*, 81 S. E. 465, 97 S. C. 85.
4. Where a servant was injured in putting candy on a pulling machine while in motion, and two witnesses testified that the work could not be performed unless the machine was in motion, whether plaintiff was negligent in so doing was for the jury. *Wreden v. Margenhoff Co.*, 81 S. E. 160, 97 S. C. 481.
  5. Where a passenger, while standing upon the bottom step of a passenger coach and swinging out beyond the line of the cars and looking backwards through curiosity, was injured by being struck by a car standing upon a sidetrack, the proximate cause of the injury was not any negligence of the carrier in failing to furnish seats, but his own contributory negligence. *Talbert v. C. & W. C. Ry. Co.*, 81 S. E. 182, 97 S. C. 465.
  6. Where a boy 19 years old left the inside of a passenger coach, where he had standing room, and went out on the platform, and was injured while swinging out from the lower step by being struck by a car standing on a sidetrack, he was guilty of contributory negligence precluding recovery. *Talbert v. C. & W. C. Ry. Co.*, 81 S. E. 182, 97 S. C. 465.
  7. Though the negligence of a carrier in failing to provide seats inside a passenger car compelled a passenger to stand upon the platform, yet where the passenger placed himself in a position of obviously greater danger by going to the lower step, swinging out and looking backwards, and was struck by a car standing upon a sidetrack, he could not recover. *Talbert v. C. & W. C. Ry. Co.*, 81 S. E. 182, 97 S. C. 465.
  8. Whether a servant riding on a car operated on tracks in a manufacturing plant was guilty of contributory negligence precluding a recovery for injuries in a collision with another car, *held*, under the evidence, for the jury. *Stanton v. Interstate Chem. Corp.*, 81 S. E. 660, 97 S. C. 408.
  9. The jury must determine under all the facts what is due care, and whether a person sustaining a personal injury exercised due care, and they must take into consideration his age, experience, mental capacity, and the dangers of the situation. *Stanton v. Interstate Chem. Corp.*, 81 S. E. 660, 97 S. C. 408.
  10. The Court, in an action for personal injuries to a plaintiff employed as a water boy, may properly warn the jury of the dangers of immaturity and want of experience in determining his guilt of contributory negligence. *Stanton v. Interstate Chemical Corp.*, 81 S. E. 660, 97 S. C. 408.

## CRIMINAL LAW.

1. An exception that the trial Judge failed to charge additional propositions of law, which were not requested, presents no error. *State v. Newman*, 81 S. E. 667, 97 S. C. 441.
2. An exception to a charge, failing to show what the charge was, will not be considered. *State v. Newman*, 81 S. E. 667, 97 S. C. 441.
3. In a prosecution for aggravated assault and battery, an exception to a charge on the law of mutual combat, not shown to have been prejudicial to the rights of defendants, *held* not ground for reversing a conviction. *State v. Newman*, 81 S. E. 667, 97 S. C. 441.
4. An additional instruction given after the jury had been out some eleven hours *held* not erroneous in confusing "belief" with satisfaction beyond a reasonable doubt. *State v. Hough*, 81 S. E. 187, 97 S. C. 24.



5. Where the jury has been out for eleven hours, it is not improper for the Court to call them in and give additional instructions on reasonable doubt, after urging them to reach a verdict. *State v. Hough*, 81 S. E. 187, 97 S. C. 24.
6. Where the Court urged the jury to reach a verdict, its failure to restate all of the law upon giving an additional instruction by reasonable doubt was not error, where the foreman stated that the jury understood the charge. *Id.*, 81 S. E. 187, 97 S. C. 24.
7. Where the foreman, when the jury after being out eleven hours announced that they were rapidly coming to a conclusion, that they reached a verdict within a half hour after the Court further charged on belief and reasonable doubt will not warrant an inference that the jury were misled by the charge into accepting a belief as equivalent to satisfaction beyond a reasonable doubt of accused's guilt. *State v. Hough*, 81 S. E. 187, 97 S. C. 24.
8. Cr. Code 1912, sec. 84, which provides that objections to any indictment for defects apparent on the face thereof must be taken by demurrer or motion to quash before the jury is sworn, held not to apply to magistrates' Courts. *State v. Williams*, 81 S. E. 154, 97 S. C. 449.
9. The general rule that questions which were not raised in the trial Court will not be considered on appeal will not be applied in a criminal case tried before a magistrate, where the warrant charges no offense against the law, and there is a total failure of proof of any crime. *State v. Williams*, 81 S. E. 154, 97 S. C. 449.

#### CRIMINAL PROCEDURE.

1. Criminal Code 1912, sec. 84, providing that objections to any indictment for defects apparent on the face thereof must be taken by demurrer or motion to

quash before the jury is sworn, does not apply to magistrate's Courts. *State v. Williams*, 81 S. E. 154, 97 S. C. 449.

#### DAMAGES.

1. A verdict for punitive damages alone is improper, if there was no evidence tending to show at least nominal actual damages. *Bethea v. Western Union Telegraph Co.*, 81 S. E. 675, 97 S. C. 385.
2. A party to a contract, to recover special damages for a breach thereof, must allege that the adverse party at the time of the making of the contract knew the peculiar circumstances which would give rise to special damages in case of a breach. *Simkins v. Western Union Telegraph Co.*, 81 S. E. 657, 97 S. C. 413.
3. An instruction that the form of the verdict should be, either that the jury found for plaintiff so many dollars actual damages and so many dollars "punitive damages," or that it found for defendant, but, if the jury found both actual and punitive damages, they should keep them separated, held proper. *Bethea v. Western Union Telegraph Co.*, 81 S. E. 675, 97 S. C. 385.
4. A verdict which finds for plaintiff for punitive damages only contains an implied finding of nominal actual damages, and is sufficient; there being evidence to sustain a finding for at least nominal damages. *Bethea v. Western Union Telegraph Co.*, 81 S. E. 675, 97 S. C. 385.
5. The Court, in determining the sufficiency of the complaint, in an action against a telegraph company for delay in the delivery of a message, causing loss of compensation for professional services, as stating a cause of action for special damages, may consider the message set out in the complaint as read in the light of the attendant circumstances known to the company, as alleged

- in the complaint. *Simkins v. W. U. Tel. Co.*, 81 S. E. 657, 97 S. C. 413.
6. A complaint, in an action against a telegraph company for delay in delivering a message asking plaintiff to go to a designated place and represent the sender before a body, which alleges that plaintiff was an attorney, and was known to the agents of the company, and that the company knew that the sender's purpose was to engage the professional services of plaintiff, and that, because of delay in the delivery of the message, plaintiff could not render the services, and was deprived of a reasonable compensation therefor, states a cause of action, as against a demurrer, for special damages for loss of compensation. *Simkins v. W. U. Tel. Co.*, 81 S. E. 657, 97 S. C. 413.
  7. A telegraph company, when sued for delay in the delivery of a message, may not complain of the defect in the complaint whereby evidence to prove notice that special damages would result from delay in delivery is set out instead of the allegation of notice. *Simkins v. W. U. Tel. Co.*, 81 S. E. 657, 97 S. C. 413.
  8. The disclosure by a telegraph operator of the contents of a message addressed to plaintiff, with reference to rates of premium charged by a surety company on the bonds of a public officer, does not justify the imposition of punitive damages on the telegraph company, there being a total absence of testimony showing the disclosure to be wilful. *Purdy v. W. U. Tel. Co.*, 81 S. E. 459, 97 S. C. 22.
  9. In absence of a showing by the record that defendant, in an action for slander, requested a charge that plaintiff could only recover actual damages for constructive malice, but may recover punitive damages for actual malice, error in not giving such a charge cannot be considered on appeal. *Smith v. Brown*, 81 S. E. 633, 97 S. C. 239.
  10. Damages may be awarded in a slander action only for words spoken at the time alleged in the complaint. *Smith v. Brown*, 81 S. E. 633, 97 S. C. 239.
  11. Where, in an action for personal injuries, the Court plainly charged that wilfulness meant a conscious realization of wrongdoing, a charge authorizing punitive damages on finding, not mere negligence, but wilfulness and wantonness, was not objectionable, as justifying a belief that the same evidence warranted a finding of negligence and wilfulness. *Settlemyer v. Southern Ry.—Carolina Division*, 81 S. E. 465, 97 S. C. 85.
- ### DEATH BY WRONGFUL ACT.
1. Under Code Civ. Proc. 1912, sec. 218, an administrator of one who finally died as the result of injuries caused by defendant's negligence cannot join in the same complaint an action for personal injuries brought under Civ. Code, 1912, sec. 3963, with one for death brought under secs. 3955, 3956. *Bennett v. Spartanburg Ry., Gas & Electric Co.*, 81 S. E. 189, 97 S. C. 21.
- ### DEEDS.
1. One who enters under a deed with knowledge that the property had been procured by the fraud of his grantor is not estopped from acquiring good title, unless he has gained an unconscionable advantage by reason of the fraudulent deed. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.
  2. The defendant, in an action for unlawful entry on land, and for possession, who interposed a general denial, was entitled to rely on the defense that plaintiff failed to prove that he ever had possession, and that the tax deed under which he claimed was void, and did not cover the land in dispute. *Nicholson v. Villepigue*, 81 S. E. 494, 97 S. C. 130.

3. The failure of the Court to construe deeds in the chain of title of the plaintiff, in an action for unlawful entry on land, and for possession, was not error, where it did not appear that such construction was necessary, and it was not requested. *Nicholson v. Villepigue*, 81 S. E. 494, 97 S. C. 130.
4. Whether a sheriff's deed, under which the plaintiff, in an action for unlawful entry on land, and for possession, claimed title covered the land in dispute was for the jury, where there was a question whether the land was covered by such deed. *Nicholson v. Villepigue*, 81 S. E. 494, 97 S. C. 130.
5. That the deed to the grantor of the plaintiff, in an action for unlawful entry, and for possession, may have conveyed only a life estate did not necessarily require a judgment for defendant on plaintiff's death and the substitution of his heirs, where there was no evidence of the death of plaintiff's grantor, since plaintiff's estate would last during his grantor's life. *Nicholson v. Villepigue*, 81 S. E. 494, 97 S. C. 130.
6. The recital in a deed from the sinking fund commission to one who was its authorized agent of a consideration of "one dollar and other valuable considerations" was not sufficient to show that the transfer was fraudulent, where the value of the other considerations did not appear. *Nicholson v. Villepigue*, 81 S. E. 494, 97 S. C. 130.
7. In an action for possession of land, where the defense was that an absolute deed was intended as a mortgage, evidence held not clear, unequivocal, and satisfactory that the conveyance was intended as a mortgage, and therefore not sufficient to sustain a finding that it was so intended. *Banks v. Frith*, 81 S. E. 677, 97 S. C. 362.
8. Where a timber deed gave to the grantee 10 years in which to cut and remove timber, and provided that in case the timber was not cut and removed before the expiration of such period the grantee should have such additional time as it might desire, but that in such event it should, during such extension period, pay interest on the original purchase price annually in advance, the right to an extension was not conditioned upon the commencement of the cutting and removal within the first 10-year period. *Midland Timber Co. v. Prettyman*, 81 S. E. 484, 97 S. C. 247.
9. Under such deed, the grantee was entitled to such an extension of time for cutting and removing the timber as it desired, and not merely to a reasonable time, since the deed was unambiguous and express, and as so construed not invalid. *Midland Timber Co. v. Prettyman*, 81 S. E. 484, 97 S. C. 247.
10. A grant of standing timber with the usual easements relating thereto, and the grant of a permanent and exclusive right of way for a permanent railroad or tramway, may properly be made in the same instrument. *Midland Timber Co. v. Prettyman*, 81 S. E. 484, 97 S. C. 247.
11. Under a timber deed providing that the grantee should have 10 years in which to cut and remove the timber, and that in case it was not cut and removed within such time, it should have such additional time therefor as it might desire, by paying annual interest on the original purchase price, drawn on a printed blank from which the provision relating to the commencement of the cutting and removal was stricken out, a further provision that the timber cut by the grantee for the purpose of opening, clearing, building, and constructing the railroads, tramways, etc., therein provided for, should not affect the time granted for cutting and removing the timber did not in any way limit the right to an extension of time, especially as it should be rejected as surplusage if, as was apparently the

- case, it was inadvertently left in the deed. *Midland Timber Co. v. Prettyman*, 81 S. E. 484; 97 S. C. 247.
12. Where defendant, who was in peaceable possession of land under a duly executed deed, knew that plaintiffs had by fraud obtained a second deed from her grantor to the same land, defendant's failure to have the second deed declared invalid will not start the running of limitations so long as no rights are asserted thereunder, for she is entitled to assume that none will ever be asserted, and, being in possession, is not injured by the existence of the deed. *Turner v. Pool*, 81 S. E. 156, 97 S. C. 446.
  13. A grantor conveying to an electric railroad company land on which to build its road, with the right to make necessary cuts and fills, cannot, without tendering back the price paid, maintain an action for fraud based on the company's representation that its road would run at grade, while made a cut of eight or ten feet. *Cochran v. Greenville etc. Ry. Co.*, 81 S. E. 191, 97 S. C. 34.
- DISMISSAL OF ACTION.
- See Nonsuit; Laches. McAuley v. Orr*, 81 S. E. 489, 97 S. C. 214.
- DISPENSARY LAW.
1. Where the supervisor calculated, after an examination of one-third of the signers of a petition for a liquor election, that the petition was signed by the required number of qualified electors, that method was not objectionable where mathematical certainty was impossible, and there was no suggestion that the calculation was not fairly and honestly made. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.
  2. The supervisor is not required to examine the tax book to ascertain whether the signers of a petition for a local option election had paid their taxes, which was a prerequisite of their qualification. *Id.*, 81 S. E. 958, 97 S. C. 1.
  3. Ballots which have a heading to designate the county and election at which they were used, which heading was the same on ballots used for voting both for and against the dispensary, do not violate Civ. Code 1912, sec. 236, prescribing what ballots may be used. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.
  4. That some of the ballots were slightly smaller than prescribed by Civ. Code 1912, sec. 236, where the difference was so slight that it could not be ascertained except by actual measurement, does not prevent the counting of those ballots. *Id.*, 81 S. E. 958, 97 S. C. 1.
  5. Where in an election to determine the question of the sale of intoxicants, enough illegal votes were cast to affect its validity, the election is void if the irregularities were such as to leave it doubtful whether the polls could be purged. *Jennings v. McCown*, 81 S. E. 963, 97 S. C. 963.
  6. That the managers of election sent the returns to the secretary of the board of canvassers, instead of sending them in the ballot boxes, was a mere irregularity, which does not invalidate the vote in those boxes. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.
  7. Where the election managers at certain precincts did not require proof of payment of taxes by the voters, and enough illegal votes were cast to leave the result in doubt, the vote of such precincts should be rejected. *Id.*, 97 S. C. 1.
  8. An objection that the petition for an election on the liquor question was not signed by the number of qualified electors required by the statute may be made after the election as a ground of contest. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.
  9. Citizens are not estopped to contest a local option election by reason of having participated in such election. *Id.*, 97 S. C. 1.

10. The decision of the supervisor that a petition for a local option election contained the required number of signatures by qualified electors is *prima facie* correct, and those contesting the election on the ground that there were not sufficient qualified signers must prove that fact. *Id.*, 97 S. C. 1.
11. That one member of a canvassing board was so biased against the contestants of a local option election that he declared the contest overruled before hearing any evidence or argument cannot avail the contestants, where there was no evidence that the other members of the board, who constituted the majority, were biased or prejudiced. *Id.*, 97 S. C. 1.
12. That one of the county board of canvassers had been employed and paid to circulate the petition for an election on the question of the sale of alcoholic liquors, and that another member of the board was a member of a town council which had employed him, though it was not shown that he voted to employ and pay him, and did not disqualify either from sitting on the county board of canvassers, since the interest in a case which will disqualify one from acting judicially therein must be something more than an interest in a question of public policy. *Boyle v. McCown*, 81 S. E. 810, 97 S. C. 15.
13. The county board of canvassers being required to meet on the Tuesday following an election on the question of the sale of alcoholic liquors to canvass the votes and declare the result, protests and contests should be filed on that day, and where the grounds of objection and protest, which contestants sought to have considered, were known or by the exercise of due diligence might have been known to them in time to present them at such meeting, the board's refusal of a continuance after adjournment to the following Saturday was not such a clear abuse of its discretion as would warrant a reversal of its action; since the Supreme Court will only correct a manifestly erroneous exercise of it resulting in prejudice to the complaining party. *Boyle v. McCown*, 81 S. E. 810, 97 S. C. 15.
14. A protest in an election contest alleging in clear language that the entire vote of two boxes named should be rejected because the managers allowed all persons who offered to vote, without requiring them to produce registration certificates, and proof of payment of taxes, by reasonable intendment alleged that the result would thereby be affected and made it a necessary inference that the voters did not produce their registration certificates and proof of payment of taxes. *Boyle v. McCown*, 81 S. E. 810, 97 S. C. 15.
15. In a contest of an election on the question of the sale of alcoholic liquors, testimony of the managers of the election to prove allegations that voters in certain precincts had been allowed to vote without producing their registration certificates or proof of tax payments, and that the result was thereby affected, was admissible, since such testimony did not contradict the returns, which merely stated the result after stating the number of votes cast on each side. *Boyle v. McCown*, 81 S. E. 810, 97 S. C. 15.
16. Where defendant's intestate, either as agent or as a principal, acting with plaintiff, sold intoxicating liquors supplied by plaintiff in violation of the laws of this State, and collected and received the purchase price therefor, plaintiff could not sue for the balance of the amount so collected, after deducting credits due the intestate, since the test of recovery in such cases is whether there is a legal obligation in favor of the plaintiff separate from the illegal transaction, and requiring no aid

from it, and the obligation of the estate could not be separated from the sales by the intestate; the debt resting upon such sales and the account arising therefrom. *Elder Harrison Co. v. Jervey*, 81 S. E. 501, 97 S. C. 185.

#### EASEMENTS.

1. An allegation that ditches obstructed by the construction of a railroad had been used to drain the lands occupied by plaintiff for more than 20 years is not sufficient to establish a prescriptive right to the use of such ditches without an allegation that the user was adverse. *Cannon v. A. C. L. R. R. Co.*, 81 S. E. 476, 97 S. C. 283.

#### ELECTIONS.

##### *See Certiorari.*

1. Const., art. II, sec. 4, subd. "c," sections 5 and 8, and Civil Code 1912, secs. 206, 208, 213, providing for the registration of voters with a right of appeal therefrom, make such registration conclusive, until reversed or set aside, as to the qualifications of the elector at the time of registration. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.
2. The entire registration of electors will not be held invalid because the registration officers failed to apply the tests of qualification prescribed by the Constitution and statutes, and to administer the prescribed oath to those applying for registration. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.
3. Every reasonable presumption will be indulged in to sustain an election. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.
4. That a member of a board of county canvassers had been a member of a town council which had employed and paid another member of the board to circulate a petition for an election on the question of the sale of alcoholic liquors did not disqualify either from sitting on the county

board of canvassers. *Boyle v. McCown*, 81 S. C. 810, 97 S. C. 15.

5. Action by county board of canvassers, who adjourned to Saturday, following its regular meeting on Tuesday, in refusing a continuance to allow the filing of further contests or protests which might have been filed at the regular meeting, *held* not such a clear abuse of its discretion as would warrant a reversal. *Boyle v. McCown*, 81 S. E. 810, 97 S. C. 15.
  6. Protest in an election contest *held* by reasonable intentment to allege that voters in certain precincts did not produce their registration certificates or proof of payment of taxes and that the result was thereby affected, and hence to be good as against demurrer. *Boyle v. McCown*, 81 S. E. 810, 97 S. C. 15.
  7. In a contest following an election on the question of the sale of alcoholic liquors, testimony of the managers to prove allegations that voters in certain precincts had been allowed to vote without producing their registration certificates or proof of tax payments, and that the result was thereby affected, *held* admissible. *Boyle v. McCown*, 81 S. E. 810, 97 S. C. 15.
- See, also, Dispensary Law. Jennings v. McCown*, 81 S. E. 968, 97 S. C. 484.
8. Any citizen taxpayer, liable as other taxpayers in like situation for debts incurred in establishment of a dispensary, may institute proceedings in nature of *certiorari*, to review action of State board of canvassers declaring election on question of such establishment legal, and the State is not a necessary party to such proceedings. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.
  9. The mere participation of a taxpayer in an election does not estop him from questioning its validity. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.

10. Whether or not a petition for an election upon question of establishment of a dispensary was signed by one-third of the qualified electors was a question of fact to be determined by the county supervisor, and his determination is to be accepted as correct, unless the contrary is shown by evidence. Every reasonable presumption will be indulged to sustain an election. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.
11. Unless the marks upon, or size of ballots are such as could destroy the secrecy of the ballot they do not violate the statutory provisions. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.
12. Failure of managers to send up return of votes in ballot box is a mere irregularity which does not vitiate the votes in those boxes. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.
13. Illegal votes where they can be eliminated from the count without affecting the result do not vitiate the election. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.
14. When the findings of the county board of canvassers are concurred in by the State board of canvassers, the Court will not review the decision of the State board as to whether the county canvassers had capacity to act. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.
15. Prejudice of a county canvasser is immaterial, where his findings are concurred in by the other members, constituting a majority of the county board, and are sustained by the State board of canvassers. *Rawl v. McCown*, 81 S. E. 958, 97 S. C. 1.

#### ELECTRIC RAILWAYS.

See *Street Railways*. *Kirkland v. A. & A. Ry. etc. Co.*, 81 S. E. 806, 97 S. C. 61; *Campbell v. Greenville etc. Ry. Co.*, 81 S. E. 676, 97 S. C. 883.

#### ELEEMOSYNARY INSTITUTIONS.

See *Colleges and Universities*. *Corley v. Am. Baptist H. M. Society*, 81 S. E. 146, 97 S. C. 146.

#### EQUITY.

1. An answer to a complaint for the possession of land conveyed by defendant to plaintiff which admitted the execution of a deed, but alleged that it was intended as a mortgage, and not an absolute conveyance, raised an equitable issue, upon which the findings by the trial Court can be reviewed. *Banks v. Frith*, 81 S. E. 677, 97 S. C. 862.
2. Sale of lands in discretion of Court. *Dinkins v. Simons*, 81 S. E. 638, 97 S. C. 261.

#### ESTOPPEL.

1. In action to recover possession of undivided interest in lands which plaintiff claimed as the heir of his mother, evidence held sufficient to go to the jury on the questions whether plaintiff was the legal heir of his mother, and whether defendant was estopped to deny plaintiff's title. *Maples v. Spencer*, 81 S. E. 483, 97 S. C. 331.
2. Where defendant leased land from plaintiff, paying rent therefor, the relation of landlord and tenant arose, and defendant is estopped to deny plaintiff's title. *Maples v. Spencer*, 81 S. E. 483, 97 S. C. 331.
3. An agent with general authority, who is authorized to make contracts of insurance without consulting the company, may waive any conditions of the policy, and his knowledge of material facts is the knowledge of the company. *Powell v. Ins. Co.*, 81 S. E. 654, 97 S. C. 875.
4. The insurance company, upon learning that insured had violated the terms of his policy by removing the property from the place in which it was insured, should have offered to return the premium and cancel the policy, and its failure to do so is evi-

dence tending to show a waiver of that condition. *Powell v. Ins. Co.*, 81 S. E. 654, 97 S. C. 375.

5. One who enters under a deed with knowledge that the property had been procured by the fraud of his grantor is not estopped from acquiring good title, unless he has gained an unconscionable advantage by reason of the fraudulent deed. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.
6. To constitute an equitable estoppel, there must have been conduct, acts, language, or silence amounting to a representation or a concealment of material facts, and the party claiming the estoppel must have acted on it, and thereby changed his position for the worse. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.

#### EVIDENCE.

1. Evidence as to communications that a mortgagor had with the officers of a mortgagee bank and all other parties, when the assignee of the mortgagee was not present, would not bind or affect him in respect to the assignment or payment of the note and mortgage in his possession. *Talbert v. Talbert*, 81 S. E. 644, 97 S. C. 186.
2. Evidence that after plaintiff had possession of a note and mortgage they were deposited in defendant bank for safe-keeping, and after a thorough search by plaintiff they could not be found, that the bank officers, on notice to produce them, testified that they were not in the bank, warranted a finding that the papers were lost and the admission of secondary evidence to show the contents of an assignment. *Talbert v. Talbert*, 81 S. E. 644, 97 S. C. 186.
3. Under Civil Code 1912, secs. 2322, 2329, where there was a failure to comply with statutory requirements in a sale of fertilizers, a recital in a note for the price to the contrary was void and did not preclude parol evidence of such noncompliance. *Southern States Phosphate Co. v. Arthurs*, 81 S. E. 663, 97 S. C. 358.
4. Where a party introduced parol evidence to show that decedent did not claim the land in controversy after an attempted levy, a statement made by decedent that he claimed the land under a will devising the same to him in fee after the termination of a life estate, made at the time an instrument admitted in evidence was probated by him and in explanation of it, was admissible, as against the objection that it was self-serving. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.
5. A statement of a person that he is the agent of another does not, in itself, prove agency, but is competent as a circumstance, in connection with other evidence, to prove agency. *Watkins v. A. C. L. R. R. Co.*, 81 S. E. 426, 97 S. C. 148.
6. Evidence introduced without objection cannot be stricken out on motion. *Watkins v. A. C. L. R. R. Co.*, 81 S. E. 426, 97 S. C. 148.
7. A motion to strike out the testimony of a witness for plaintiff that B had attempted to improperly influence him was properly denied, when made during the cross-examination of the witness, who stated that he did not know for whom B was working, but that B had stated that he was working for the defendant, and where the testimony was received without objection. *Watkins v. A. C. L. R. R. Co.*, 81 S. E. 426, 97 S. C. 148.
8. An exception to the overruling of an objection to a question asked a witness must be overruled, where the question was not answered. *Watkins v. A. C. L. R. R. Co.*, 81 S. E. 426, 97 S. C. 148.
9. Where it appears from the exceptions that the trial Court and the attorneys understood that the objection to a certain line of testimony was to continue throughout the trial, it was not



- necessary to repeat the objection every time similar evidence was offered. *Gill v. Ruggles*, 81 S. E. 519, 97 S. C. 278.
10. Where the defendant, by a written contract, agreed to purchase certain land for a named sum, and thereafter to convey it to a corporation to be formed by the parties to the contract in exchange for a proportion of the preferred stock of the company, the amount of which stock was to depend upon the consideration paid for the land and the improvements made thereon, which were to be paid for by defendant, the amount of consideration was contractual, and not merely inserted in the contract by way of recital, and parol evidence to vary such amount was inadmissible. *Gill v. Ruggles*, 81 S. E. 519, 97 S. C. 278.
  11. Testimony by the plaintiffs that they had paid a part of the purchase price of certain lands which the defendant had agreed to pay was admissible, where such payment was alleged in the complaint, even though it was not alleged that the payment was made at defendant's request or ratified by him, since objection to testimony tending to prove allegations made is not a proper method of questioning the sufficiency of the complaint. *Gill v. Ruggles*, 81 S. E. 519, 97 S. C. 278.
  12. Testimony that other horses were frightened by the same object under like circumstances, as alleged in the testimony with reference to the horse in question, was relevant to the issue, was the object one apt to frighten ordinary horses. *Settlemyer v. So. Ry.—Carolina Division*, 81 S. E. 465, 97 S. C. 85.
  13. It is competent on cross-examination of a medical expert to inquire what symptoms following a blow upon the head would, or would not, indicate a fracture of the skull. *Settlemyer v. So. Ry.—Carolina Division*, 81 S. E. 465, 97 S. C. 85.
  14. Statements by defendant derogatory to plaintiff's character, made at other times than those alleged in the complaint, are competent evidence of express malice. *Smith v. Brown*, 81 S. E. 633, 97 S. C. 239.
  15. Where there was no contest as to the existence of a fact, error, if any, in admitting secondary evidence to prove the fact, was not prejudicial. *Carolina Nat. Bank v. Greenville*, 81 S. E. 634, 97 S. C. 291.
  16. Testimony of party as to transaction between his ancestor and lunatic, adverse party held admissible to show absolute deed a mortgage. *Dinkins v. Simons*, 81 S. E. 638, 97 S. C. 261.
  17. The consideration in an assignment being stated to be "value received" parol evidence is admissible to show the true consideration. *Rawls v. Ins. Co.*, 81 S. E. 505, 97 S. C. 189.

#### EXCEPTIONS.

*See Appeal and Error. Gill v. Ruggles*, 81 S. E. 519, 97 S. C. 278.

#### FELLOW SERVANTS.

*See Master and Servant. Stanton v. Interstate Chem. Corp.*, 81 S. E. 660, 97 S. C. 408.

#### FERTILIZERS.

1. In an action on a promissory note given for fertilizer which stipulated that the maker would in nowise hold the payee responsible for the practical results of the fertilizer on crops, it was error to strike as sham a counterclaim alleging that the plaintiff represented that the fertilizer was adapted to promote growth of cotton and defendant purchased it relying on such representation, but that it in fact damaged his cotton crop; the counterclaim being proper. *Germofert Mfg. Co. v. Castles*, 81 S. E. 665, 97 S. C. 389.
2. An allegation is irrelevant, where the issue made by its denial has no effect upon the cause

of action or no connection with the allegation, and, in an action on a note given for fertilizer which provided that the payee should not be held responsible for the results of the fertilizer on the crops, allegations of a counterclaim that defendant purchased the fertilizer on plaintiff's representations that it was adapted to cotton, but that it in fact damaged defendant's cotton, were not irrelevant. *Germofert Mfg. Co. v. Castles*, 81 S. E. 665, 97 S. C. 389.

8. Under Civil Code 1912, sec. 2322, requiring every bag, barrel, or other package of fertilizers offered for sale or delivered after sale to have thereon a label or stamp setting forth the weight and chemical composition of its contents and the minimum percentage of specified ingredients guaranteed to be present, and a label giving the grade thereof, as high grade, low grade, or standard; and section 2329, providing that any vendor of commercial fertilizers whose goods shall fall short in commercial value guaranteed by the analysis appearing thereon when delivered shall be liable to the purchaser for the same per centum and selling price as the goods have fallen short, if fertilizers sold did not come up to weight and guaranteed analysis and were not actually delivered in kind according to contract, recitals, in a note for the purchase price as to the weight, that each sack bore the guaranteed analysis and inspector's tag, and in all respects complied with the law, and that the seller had neither impliedly nor expressly warranted the effects thereon on crops and an agreement therein that the buyer could not hold the seller responsible for practical results, were attempts to dispense with the statutory requirements and void, and did not preclude parol evidence of the noncompliance with statute. *So. States Phosphate Co. v.*

*Arthurs*, 81 S. E. 663, 97 S. C. 358.

### FIRES.

1. The refusal of a motion to require complaint to be made more definite and certain so as to state from what engine or engines the sparks of fire escaped, or whether it was from a freight or passenger train, the direction in which it was going, also what officer or agent of defendant knew or consented to the placing of the property which was destroyed upon its right of way, and when such consent was given, and the particular items of the property destroyed and the value of each item, was not an abuse of discretion on part of the trial Court. *Muckenfuss v. A. & C. A. L. R. R. Co.*, 80 S. E. 460, 97 S. C. 46.

### FIXTURES.

1. Within the clause of a fire policy providing for a forfeiture, "if the subject of insurance be personal property, and becomes incumbered by a chattel mortgage," there is no forfeiture because of a mortgage on land, "with all improvements thereon situate," if the insured property on the land is a fixture. *Rawls v. Ins. Co.*, 81 S. E. 505, 97 S. C. 189.
2. Unless the facts are susceptible of but one inference, there is a question of fact as to whether a structure on land is a fixture. *Rawls v. Ins. Co.*, 81 S. E. 505, 97 S. C. 189.

### FORECLOSURE.

*See Mortgages. Taylor v. King*, 81 S. E. 172, 97 S. C. 477.

### FRAUD.

*See Bills and Notes; Cancellation of Instruments; Deeds; Witnesses.*

1. That party thought cotton worth less than \$300 against which he drew for \$500 was worth that

amount held not a defense in an action for fraud. *Farmers Bank of McCormick v. Talbert*, 81 S. E. 305, 97 S. C. 74.

2. Deposit of draft drawn against cotton to meet checks for the purchase price, though it had already been drawn against, with bill of lading attached, held to show fraud. *Farmers Bank of McCormick v. Talbert*, 81 S. E. 305, 97 S. C. 74.
3. A grantor conveying a right of way to an electric railroad company with the right to make cuts and fills may not, without first tendering back the price, sue for fraud based on the company's representation that the road would run at grade. *Cochran v. Greenville, S. & A. Ry.*, 81 S. E. 191, 97 S. C. 34.
4. Fraud inducing a conveyance may be set up, not only against the one who perpetrated the fraud, but against one claiming under the conveyance. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.
5. The statute limiting the time in which an action may be brought for fraud does not limit the time in which one may defend against a deed procured by fraud. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116; *Turner v. Pool*, 81 S. E. 156, 97 S. C. 446.
6. One who enters under a deed with knowledge that the property had been procured by the fraud of his grantor is not estopped from acquiring good title, unless he has gained an unconscionable advantage by reason of the fraudulent deed. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.
7. The recital in a deed from the sinking fund commission to one who was its authorized agent of a consideration of "one dollar and other valuable considerations" was not sufficient to show that the transfer was fraudulent, where the value of the other considerations did not appear. *Nicholson v. Villepigue*, 81 S. E. 498, 97 S. C. 130.

## FRAUD IN INSURANCE POLICY.

*See Cancellation of Instruments. Phila. Life Ins. Co. v. Arnold*, 81 S. E. 654, 97 S. C. 418.

## FRAUDULENT CONVEYANCES.

1. Where in a suit by creditors to set aside mortgages the debtor, in whom was the legal title to the property, and lien creditors were before the Court, it had jurisdiction to order a sale of the property. *Virginia-Carolina Chemical Co. v. Hunter*, 81 S. E. 190, 97 S. C. 31.
  2. If, in proceedings by creditors to set aside fraudulent conveyances and have the property sold, etc., a change of conditions is shown after the order was entered ordering the sale of the property, such as the payment or arrangement to pay a part of the debts, a subsequent Judge could modify the order of sale to meet the changed conditions. *Virginia-Carolina Chemical Co. v. Hunter*, 81 S. E. 190, 97 S. C. 31.
- See, also, Limitations of Actions. Turner v. Pool*, 81 S. E. 156, 97 S. C. 446; *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.

## HIGHWAYS.

1. Under Laws 1910, p. 948, sec. 7, empowering the commission, provided for improving roads of Marion county, to condemn, "provided, that where lands are condemned, the damage shall be fixed as now provided by law," the damages are to be fixed by the county board as theretofore. *Johnson v. Road and Highway Com.*, 81 S. E. 502, 97 S. C. 205.
2. Whether the commission for improving roads in Marion county is proceeding to build a new road or relocate an old road is immaterial; Laws 1910, p. 948, secs. 5, 7, empowering it to do both. *Johnson v. Road and Highway Com.*, 81 S. E. 502, 97 S. C. 205.

3. The action being merely to enjoin the commission of Marion county from opening a new road, the purpose or right of the commission to abandon part of an old road is not before the Court. *Johnson v. Road and Highway Commission*, 81 S. E. 502, 97 S. C. 205.
4. The act (Acts 1910, p. 945), entitled "An act to authorize the county of Marion to issue bonds for permanent road and highway improvements, and to provide for expenditure of the same," providing for improvement of public highways in the county, has but a single purpose, sufficiently set forth in the title under Const., art. III, sec. 17. *Johnson v. Road and Highway Com.*, 81 S. E. 502, 97 S. C. 205.
5. The State Railroad Commission has only those powers given to it by statute, and hence in the absence of statute, could not require a city to submit plans for safeguarding a dangerous railroad crossing. *R. R. Comrs. v. So. Ry. Co.*, 81 S. E. 314, 97 S. C. 77.
6. Act February 16, 1912 (27 Stat. at Large, p. 791, authorizing the Railroad Commission to regulate the manner in which a street may cross a railroad track, is not retroactive, and does not apply to a crossing made before its enactment. *R. R. Comrs. v. So. Ry. Co.*, 81 S. E. 314, 97 S. C. 77.
7. Where an order of the railroad commission, compelling a railroad company and a city to safeguard a street crossing was directed to both defendants, and contemplated that they should share the cost of the improvement, dismissal of a petition for mandamus to enforce the order as to the city requires its dismissal as to the railroad company, as the commission might not have required the company to make the improvement at its sole expense. *R. R. Comrs. v. So. Ry. Co.*, 81 S. E. 314, 97 S. C. 77.
8. The kind of crossing and safeguards which may be required under act of February 16, 1912 (27 Stat. at Large, 791), authorizing the Railroad Commission to regulate the manner in which a street may cross a railroad track, is in the discretion of the commission. *R. R. Comrs. v. So. Ry. Co.*, 81 S. E. 314, 97 S. C. 77.
9. A railroad company negligently leaving a car loaded with wild animals in close proximity to a public highway, where it would be apt to frighten animals passing upon the highway, is liable for a nuisance at common law. *Settlemyer v. So. Ry.—Car. Div.*, 81 S. E. 465, 97 S. C. 85.
10. Whether a way exists, and whether or not it is public, are questions of fact for a jury under proper instructions. *Settlemyer v. So. Ry.—Car. Div.*, 81 S. E. 465, 97 S. C. 85.

#### HUSBAND AND WIFE.

1. As to slave marriages, *see Maples v. Spencer*, 81 S. E. 488, 97 S. C. 331.

#### INSURANCE.

1. An agent with general authority, who is authorized to make contracts of insurance without consulting the company, may waive any conditions of the policy. *Powell v. Continental Ins. Co. of City of New York*, 81 S. E. 654, 97 S. C. 375.
2. Where an agent with general authority is authorized to make contracts of insurance without consulting the company, his knowledge of material facts is the knowledge of the company. *Powell v. Continental Ins. Co. of City of New York*, 81 S. E. 654, 97 S. C. 375.
3. Knowledge of the fire insurance agent within the scope of his agency that an insured had removed the insured property, contrary to the terms of the policy, was imputable to the principal. *Powell v. Continental Ins. Co. of New York*, 81 S. E. 654, 97 S. C. 375.

4. The insurance company, upon learning that insured had violated the terms of his policy by removing the property from the place in which it was insured, should have offered to return the premium and cancel the policy, and its failure to do so is evidence tending to show a waiver of that condition. *Powell v. Continental Ins. Co. of City of New York*, 81 S. E. 654, 97 S. C. 375.
5. A life policy, providing that it shall be incontestable, except for nonpayment of premiums, after one year from its date, was not objectionable as in conflict with the State statute of limitations, but was valid. *Philadelphia Life Ins. Co. of Philadelphia, Pa., v. Arnold*, 81 S. E. 964, 97 S. C. 418.
6. In an action on a life policy, evidence of decedent's attending physician that within a year prior to the date of the policy he had treated her for a run-down condition of her system, and suspected lung trouble, but never made any tuberculin test, and did not know whether she had tuberculosis or not, was insufficient to sustain a defense under a provision of the policy that no obligation was incurred unless on the date of the policy insured was in sound health, in that at that time she was afflicted with tuberculosis. *Ledford v. Metropolitan Life Ins. Co.*, 81 S. E. 497, 97 S. C. 164.
7. Where, in an action on a life policy, defendant pleaded unsound health of insured at the time the policy was issued by reason of tuberculosis, and for that reason the policy was void under a provision that no obligation was assumed thereunder unless insured was in good health at the time the policy was delivered, defendant was confined to the disability pleaded, and could not claim a forfeiture for other reasons. *Ledford v. Metropolitan Life Ins. Co.*, 81 S. E. 497, 97 S. C. 164.
8. Within the clause of a fire policy providing for a forfeiture, "if the subject of insurance be personal property and becomes incumbered by a chattel mortgage," there is no forfeiture because of a mortgage on land, "with all improvements thereon situate," if the insured property on the land is a fixture. *Rawl v. Am. Cen. Ins. Co.*, 81 S. E. 505, 97 S. C. 189.
9. The assignment, "For value received, I hereby transfer all my rights and title to the within note and mortgage, \* \* \* without recourse," is sufficient in form to transfer the assignor's interest as mortgagee in the insurance on the mortgaged property. *Rawl v. Am. Cen. Ins. Co.*, 81 S. E. 505, 97 S. C. 189.
10. A mortgagee's interest being insured, the insurer on paying his claim is entitled to subrogation to the mortgagee's rights under the mortgage. *Rawl v. Am. Cen. Ins. Co.*, 81 S. E. 505, 97 S. C. 189.
11. The insurer having cancelled the insurance and returned the premium to the owner of the property, without notice to the mortgagee, whose interest was insured, the mortgagee, recovering of the insurer on a loss occurring, is not required to return to the insurer the premium which it returned to the property owner. *Rawl v. Ins. Co.*, 81 S. E. 505, 97 S. C. 189.

#### INDICTMENT.

See *Criminal Procedure. State v. Williams*, 81 S. E. 154, 97 S. C. 449.

#### INTOXICATING LIQUORS.

See *Dispensary*.

#### ISSUES.

See *Equity. Banks v. Frith*, 81 S. E. 677, 97 S. C. 362.

#### JUDGE.

See *Judgments. Middleton v. Denmark Ice & Fuel Co.*, 81 S. E. 157, 97 S. C. 457.

## JUDGMENT.

*See Appeal and Error.*

1. The denial of a motion to open a default under Code Civ. Proc. 1912, sec. 225, held not abuse of discretion. *Farmers Bank of McCormick v. Talbert*, 81 S. E. 805, 97 S. C. 74.
2. A Judge has no power at chambers, without the consent of all the parties to correct the judgment of a Court (Civ. Code 1912, sec. 3883). *Middleton v. Denmark Ice & Fuel Co.*, 81 S. E. 157, 97 S. C. 457.
3. The judgment of a Judge presiding in a county from which no appeal is taken may not be reviewed, modified, or reversed by the resident Judge of the Circuit of which the county was a part. *Middleton v. Denmark Ice & Fuel Co.*, 81 S. E. 157, 97 S. C. 457.
4. Where the Court entered two decrees at different times, but the first decree merely adjudicated the rights of the parties and directed the submission of a formal decree, and the Court retained jurisdiction until such submission, a notice of intention to appeal, served within ten days of notice of filing of the formal decree, was in time, though more than ten days elapsed between the entry of the first decree and the giving of the notice. *Dinkins v. Simons*, 81 S. E. 638, 97 S. C. 261.

## JURISDICTION.

1. Failure of a defendant residing in one county, personally served with summons before a magistrate of an adjoining county in an action for claim and delivery of personal property within the territorial jurisdiction of such magistrate, to appear and object to the jurisdiction of the magistrate, waives want of jurisdiction over him, and a default judgment against him in such action is valid. *Rogers v. Townes*, 81 S. E. 278, 97 S. C. 56.

## JURY.

1. In an action for personal injuries caused by a team of mules becoming frightened at an automobile and running away, the Court did not abuse its discretion in denying a new trial because one of the jurors accepted the hospitality of, and spent night in the house of, the owner of the mules, who was also suing the automobile owner for injuries to the mules sustained at the same time, where it appeared that the juror did not know of such person's interest in the suit until too late, and that the case was not discussed. *Davis v. Littlefield*, 81 S. E. 487, 97 S. C. 171.
2. Where jury has been out for the space of eleven hours, it is not improper for the Court to call them in and give additional instructions on law as to reasonable doubt, the additional charge being appropriate to the ground of the jury's difference. *State v. Hough*, 81 S. E. 187, 97 S. C. 24.

## JUDICIAL SALES.

1. A master in chancery in selling land under a decree only allowed the purchaser three hours in which to comply with the terms of sale, and, upon non-compliance within that time, re-sold the property. *Held*, that the purchaser was not allowed a reasonable time to examine the title, and hence the resale was a nullity. *Smith v. Smith*, 81 S. E. 499, 97 S. C. 242.
2. In an action by the purchaser of land at a judicial sale, claimed to have been paid for by giving a check to defendant clerk of Court, which he failed to diligently present for payment before the bank had become insolvent, to compel defendant to make title to the land to plaintiff, evidence held to sustain a finding that the clerk received the check to collect it for plaintiff, and not as payment, and that he made reasonable efforts to collect the check. *Eleazer v.*

*Shealey*, 81 S. E. 648, 97 S. C. 385.

### LABORER'S CONTRACTS.

*See Contracts. State v. Williams*, 81 S. E. 154, 97 S. C. 449.

### LACHES.

1. An action to recover certain real estate and rents and profits against certain defendants, all of whom but one were minors, was instituted March 4, 1889. No guardian *ad litem* was appointed, but a demurrer on the ground that two causes of action were improperly united was sustained November 30, 1891, and plaintiffs were given the right to elect on which cause of action they would go to trial. From 1892, when notice of election was served, until 1912, when a guardian *ad litem* for certain minor plaintiffs was appointed, nothing was done. One of the original plaintiffs died in 1894, after having promised one of defendants that he would abandon the suit. The cause was first docketed in April, 1889, and carried forward from term to term until the October, 1897, term, when it was "stricken off with leave to restore." It did not again appear on the calendar until the April, 1900, term. In April, 1889, a referee was appointed, and in January, 1913, the heirs at law of the deceased plaintiff asked leave to amend the complaint and to serve a supplemental complaint, whereupon defendants moved to dismiss for want of prosecution. *Held*, that plaintiffs were guilty of inexcusable laches, entitling defendants to a dismissal. *McAuley v. Orr*, 81 S. E. 489, 97 S. C. 214.

### LANDLORD AND TENANT.

*See Adverse Possession.*

1. A home mission society *held* not liable for an injury to a third party caused by the negligence of students of a college, where

it took no part in the active management of the college, though it allowed the use of the land upon which it was located, and supplied the fund for the payment of its teachers. *Corley v. American Baptist Home Mission Society*, 81 S. E. 146, 97 S. C. 460.

2. Where defendant leased land from plaintiff, paying rent therefor, the relation of landlord and tenant arose, and defendant is estopped to deny plaintiff's title. *Maples v. Spencer*, 81 S. E. 483, 97 S. C. 331.

### LIBEL AND SLANDER.

*See Appeal and Error; Trial.*

1. Spoken words charging a crime are actionable. *Smith v. Brown*, 81 S. E. 633, 97 S. C. 239.
2. Damages may be awarded in slander only for words spoken at the time alleged in the complaint. *Smith v. Brown*, 81 S. E. 633, 97 S. C. 239.
3. Statements by defendant derogatory to plaintiff's character, made at other times than those alleged in the complaint, are competent evidence of express malice. *Smith v. Brown*, 81 S. E. 633, 97 S. C. 239.

### LIFE ESTATES.

*See Recovery of Real Property. Nicholson v. Villepigue*, 81 S. E. 494; 97 S. C. 130.

### LIMITATIONS OF ACTIONS.

1. Where defendant, in peaceable possession of land under a deed, knew that plaintiffs had by fraud obtained a second deed from her grantor to the same land, defendant's failure to have the second deed declared invalid will not start the running of limitations so long as no rights are asserted thereunder. *Turner v. Pool*, 81 S. E. 156, 97 S. C. 446.
2. The statute limiting the time in which an action may be brought for fraud does not limit the time in which one may defend against a deed procured by fraud. *Can-*

*non v. Baker*, 81 S. E. 478, 97 S. C. 116.

LIMITATIONS OF ESTATES.

*See Wills. Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.

MAGISTRATES.

1. An order of the Circuit Court granting a new trial in a case removed into that Court by appeal from a magistrate's Court is not appealable, where it does not appear that the decision was influenced by any error of law, or that the Supreme Court could render judgment absolute if it should determine that no error was committed in granting the new trial. *Eaker v. Floyd*, 81 S. E. 656, 97 S. C. 381.
2. Failure of a defendant residing in one county, personally served with summons before a magistrate of an adjoining county in an action for claim and delivery of personal property within the territorial jurisdiction of such magistrate, to appear and object to the jurisdiction of the magistrate, waives want of jurisdiction over him, and a default judgment against him in such action is valid. *Rogers v. Townes*, 81 S. E. 278, 97 S. C. 56.
3. Form and sufficiency of warrants. *See Criminal Law*, 8. *State v. Williams*, 81 S. E. 184, 97 S. C. 449.

MANDAMUS.

1. Where an order of the railroad commission, compelling a railroad company and a city to safeguard a street crossing, was directed to both defendants, dismissal of a petition for mandamus to enforce the order as to the city requires its dismissal as to the company, as the commission might not have required the company to make the improvement at its sole expense. *R. R. Comrs. v. Southern Ry. Co.*, 81 S. E. 314, 97 S. C. 77.

MARRIAGES.

1. Of slaves. *See Maples v. Spencer*, 81 S. E. 483, 97 S. C. 331.

2. Of white and colored races. *See Tucker v. Blease et al.*, 81 S. E. 668, 97 S. C. 308.

MASTER AND SERVANT.

1. The nonassignable duties of an employer operating cars on a track in its plant are, as to one having the right to ride on the cars without controlling their operation, to have the cars safely driven by a competent servant. *Stanton v. Interstate Chemical Corporation*, 81 S. E. 660, 97 S. C. 403.
2. A servant assumes the risks ordinarily incident to his employment, but not the risks due to the negligence of the master. *Stanton v. Interstate Chemical Corporation*, 81 S. E. 660, 97 S. C. 403.
3. Whether an employer operating cars on a track in its plant was guilty of actionable negligence, resulting in injury to an employee in a collision between cars, held for the jury. *Stanton v. Interstate Chemical Corporation*, 81 S. E. 660, 97 S. C. 403.
4. An employee in charge of a car operated on tracks in a manufacturing plant and a water boy riding thereon, in the performance of his duty not connected with the operation of the car, or in aiding in keeping the track or a switch in repair, are not fellow servants as a matter of law. *Stanton v. Interstate Chemical Corporation*, 81 S. E. 660, 97 S. C. 403.
5. Whether a servant riding on a car operated on tracks in a manufacturing plant was guilty of contributory negligence held for the jury. *Stanton v. Interstate Chemical Corporation*, 81 S. E. 660, 97 S. C. 403.
6. The Court, in an action for personal injuries to an infant employed as a water boy in a manufacturing plant, may properly warn the jury of the dangers of immaturity and want of experience, in determining his guilt of contributory negligence. *Stanton v. Interstate Chemical Cor-*



- poration, 81 S. E. 660, 97 S. C. 403.
7. In an action for injuries to an employee brought against the employer and a superior employee, evidence *held* to show that the superior employee was, as a matter of law, not liable. *Stanton v. Interstate Chemical Corporation*, 81 S. E. 660, 97 S. C. 403.
  8. Under Cr. Code 1912, secs. 492, 494, and 497, where the warrant does not allege, and the proof does not show, whether the contract for personal services alleged to have been breached was verbal or in writing, or whether it was witnessed, a conviction could not be predicated thereon. *State v. Williams*, 81 S. E. 154, 97 S. C. 449.
  9. Where a servant was injured in putting candy on a pulling machine while in motion, and two witnesses testified that it could not be done while the machine was at rest, whether plaintiff was negligent in so doing was for the jury. *Wreden v. Marjehoff Co.*, 81 S. E. 160, 97 S. C. 481.
  10. A railway employee, who is within the Federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stats., 65 U. S. Comp. St. Supp., 1911, p. 1822), while actually engaged in relaying rails on a line of railway is also within the act while asleep at night in a shanty car of a train on a sidetrack, placed there for the accommodation of such employees, and he may recover for injuries sustained in consequence of the shanty car being struck by another train. *Sanders v. C. & W. C. Ry. Co.*, 81 S. E. 288, 97 S. C. 50.
  11. Where a resident of Chicago, whose family was temporarily established in Aiken, provided an automobile for the health and pleasure of his family, which his son had permission to use, and which such son, or one of the other sons, ran whenever their mother desired to use it, he was liable for the negligence of such son while driving the automobile for a ride for his pleasure, it not being his mother's intention to take part in the trip in any manner; and the owner, though not liable for the negligence of his son, as such, was liable for the negligence of his servant in the course of his employment. *Davis v. Littlefield*, 81 S. E. 487, 97 S. C. 171.
  12. An untoward event which works injury to the operator of a machine in a factory does not of itself raise a presumption that the machine was defective, but there must be other direct or circumstantial evidence that the machine caused the injury because of a defect in its parts, and that such defect was the result of the master's negligence. *Turner v. F. W. Poe Mfg. Co.*, 81 S. E. 480, 97 S. C. 112.
  18. Plaintiff's loom having stopped, she took hold of the wheel to adjust the harness, when the loom started involuntarily, and some part of it jerked plaintiff and caused her injury. The only other evidence to show defect in the loom was that the loom fixer had been called to that loom the afternoon before, and that all the looms in the mill after eight years' use and in the year succeeding the accident were discarded. *Held*, that such proof was insufficient to show that plaintiff's accident resulted from a defect in the loom or from defendant's negligence. *Turner v. F. W. Poe Mfg. Co.*, 81 S. E. 430, 97 S. C. 112.

#### MISCEGENATION.

1. Provisions against. *See Tucker v. Blease*, 81 S. E. 668, 97 S. C. 308.

#### MORTGAGES.

*See Chattel Mortgages.*

1. An assignment of a note and mortgage is not required by law to be executed in the presence of witnesses, and, when unattested by a subscribing witness, may be proved by any one who was present and saw it exe-

- cuted. *Talbert v. Talbert*, 81 S. E. 644, 97 S. C. 186.
2. The purchase of a negotiable mortgage note before maturity and its transfer before maturity would carry with it the same protection to the mortgage, its accessory, as the note itself was entitled to. *Talbert v. Talbert*, 81 S. E. 644, 97 S. C. 186.
  8. Where the assignee of an unsatisfied mortgage was in possession of it and the note, he was *prima facie* the owner and holder of them, and the burden was on a party opposing foreclosure to show payment, satisfaction, or that he was not the owner or holder. *Talbert v. Talbert*, 81 S. E. 644, 97 S. C. 186.
  4. Evidence held not clear, unequivocal, and satisfactory that the conveyance was intended as a mortgage. *Banks v. Frith*, 81 S. E. 677, 97 S. C. 362.
  5. Mortgagee held not entitled to attack tender for slight deficiency in the amount where he refused the tender on another ground. *Taylor v. King*, 81 S. E. 172, 97 S. C. 477.
  6. Where note and mortgage were placed in hands of attorney, and tender made before date to which time of payment was extended, attorney's fees stipulated for, if placed in the hands of an attorney, will be denied. *Taylor v. King*, 81 S. E. 172, 97 S. C. 477.
  7. Mortgagee held not to be relieved from effect of refusal of tender because of failure of mortgagor's agent to date a credit on the note, especially where it did not appear that the tender would have been accepted had the credit been dated. *Id.*, 81 S. E. 172, 97 S. C. 477.
  8. Where the owner of a nonnegotiable bond and mortgage assigned it, the assignment being recorded, a *bona fide* purchaser without notice from the assignee is protected; the mortgagee being estopped to assert her rights. *Anderson v. Citizens Bank*, 81 S. E. 158, 97 S. C. 453.
  9. Where a purchaser of land paid the consideration, was put in possession, and made improvements, he was the owner, and the holding of the title deeds by the vendor as security for a debt did not create a mortgage. *Haselden v. Hamer*, 81 S. E. 424, 97 S. C. 178.
  10. In an action for partition, in which it is sought to subject an interest descended to heirs to the *pro tanto* payment of a mortgage executed by the ancestor, evidence held not to show that the ancestor signed the mortgage as surety for certain persons, but to show that she signed it only for her son. *Ayer v. Hughes*, 81 S. E. 510, 97 S. C. 255.
  11. The release by a mortgagee or payee of one of the several makers of a bond and mortgage, or the material alteration of the bond by the payee, will release a surety thereon, where he did not consent thereto. *Ayer v. Hughes*, 81 S. E. 510, 97 S. C. 255.
  12. A surety for the payment of a mortgage debt would be only liable for one-eighth of the debt where the principal only had a one-eighth interest in the mortgaged property, though there were only five of the mortgagors, including such surety. *Ayer v. Hughes*, 81 S. E. 510, 97 S. C. 255.
  13. The property of one of several mortgagors will not be applied to the payment of the mortgage debt before the property of the surety of another of the mortgagors, where the first mentioned mortgagor has not imposed such a prior liability upon his property, by contract or otherwise. *Ayer v. Hughes*, 81 S. E. 510, 97 S. C. 255.
  14. Where the mortgagor, after giving a crop mortgage for the next season, surrendered possession to the real property mortgagee without having planted crops, and the proceeds of the crop raised by the mortgagee together with the proceeds of

the land upon foreclosure did not satisfy the real property mortgage, the crop mortgagee has no rights. *Kendrick v. Moseley*, 81 S. E. 652, 97 S. C. 397.

## MUNICIPAL CORPORATIONS.

1. A contract for street paving, under which the contractor guarantees for five years from final payment to keep the work in good repair, does not permit the city, protected by a bond conditioned on the contractor performing the contract, to retain any part of the price to perfect the pavement and keep it in repair for that time. *Carolina Nat. Bank of Columbia v. City of Greenville*, 81 S. E. 634.
2. The State Railroad Commission has only those powers given to it by statute, and hence in the absence of statute, could not require a city to submit plans for safeguarding a dangerous railroad crossing. *R. R. Comrs. v. So. Ry. Co.*, 81 S. E. 314, 97 S. C. 77.
3. Act February 16, 1912 (27 Stat. at Large, p. 791), authorizing the railroad commission to regulate the manner in which a street may cross a railroad track, is not retroactive, and does not apply to a crossing made before its enactment. *R. R. Comrs. v. So. Ry. Co.*, 81 S. E. 314, 97 S. C. 77.
3. Where an order of the railroad commission, compelling a railroad company and a city to safeguard a street crossing was directed to both defendants, and contemplated that they should share the cost of the improvement, dismissal of a petition for mandamus to enforce the order as to the city requires its dismissal as to the railroad company, as the commission might not have required the company to make the improvement at its sole expense. *R. R. Comrs. v. So. Ry. Co.*, 81 S. E. 314, 97 S. C. 77.
5. The kind of crossing and safeguards which may be required under act of February 16, 1912

(27 St. at Large, 791), authorizing the railroad commission to regulate the manner in which a street may cross a railroad track, is in the discretion of the commission. *R. R. Comrs. v. So. Ry. Co.*, 81 S. E. 314, 97 S. C. 77.

## NEGLIGENCE.

*See Master and Servant; Trial; Contributory Negligence.*

1. The jury must determine under all the facts what is due care and whether a person sustaining a personal injury exercised due care, and they must consider his age, experience, mental capacity, and the dangers of the situation. *Stanton v. Interstate Chemical Corporation*, 81 S. E. 660, 97 S. C. 403.
  2. A charge, that unless the jury found that a pile of shingles and coal, alleged to be a nuisance endangering travel on a public way, was placed or permitted to remain upon defendant's premises, and under its control, it could not obtain as an element of negligence against it. *held*, not liable to construction that the defendant would be liable if such pile were upon its premises, without reference to negligence and proximate cause; as the jury was also instructed that the defendant would only be liable for damages occasioned by the pile of shingles and coal, if they were negligently placed or left at the locus, and were a proximate cause of the injury. *Settlemyer v. So. Ry.—Carolina Division*, 81 S. E. 465, 97 S. C. 85.
- See Colleges and Universities. Corley v. Am. Baptist H. M. Society*, 81 S. E. 146, 97 S. C. 460. In *Accidents at Railroad Crossings*, see *Sanders v. So. Ry.—Carolina Division*, 81 S. E. 786, 97 S. C. 423. In *Collection of Cheques*, see *Eleazer v. Shealey*, 81 S. E. 648, 97 S. C. 335.

## NEW TRIALS.

*See Appeal and Error. Eaker v. Floyd*, 81 S. E. 656, 97 S. C. 881.

1. Where a judgment was reversed on former appeal because of Court's omission to submit an issue of adverse possession to the jury, which issue was submitted on retrial, it was not error to refuse to grant a new trial because the Court differed from the jury in its view of the evidence. *Dunlap v. Robinson*, 81 S. E. 428, 97 S. C. 79.
2. Where there was some evidence to sustain the verdict, it was not error to refuse a new trial, on the ground of absence of testimony to sustain it. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.
3. Refusal of a new trial on the ground of the insufficiency of the evidence will not be disturbed on appeal, in the absence of any abuse of discretion. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.
4. For misconduct of jurors, *see Jury*. *Davis v. Littlefield*, 81 S. E. 487, 97 S. C. 171.

#### NONSUITS.

*See Master and Servant*. *Turner v. Poe Mfg. Co.*, 81 S. E. 480, 97 S. C. 112; *Wreden v. Marjenhoff Co.*, 81 S. E. 160, 97 S. C. 481.

1. The weight of testimony being for the jury, the case should not be taken from them where there is any testimony supporting plaintiff's claim. *Maples v. Spencer*, 81 S. E. 488, 97 S. C. 381.
2. A building contract providing for payments being made to the contractor on certificates of the architects, a nonsuit should be granted, in an action by the contractor for money certified by the architects to be due, their letter to him accompanying the certificate, given before it was due under the contract, providing, "this certificate is given with the understanding that you are to let W. (the owner) have immediate possession of the house," and he not having given immediate possession, but for weeks kept and refused to give up the keys. *Dobey v. Watson*, 81 S. E. 658, 97 S. C. 349.

3. A nonsuit cannot be granted where there is any evidence offered by plaintiff to prove his case. *Stanton v. Interstate Chem. Corp.*, 81 S. E. 660, 97 S. C. 408; *Maples v. Spencer*, 81 S. E. 488, 97 S. C. 381.
4. Whether an employer operating cars on a track in its plant was guilty of actionable negligence resulting in injury to an employee in a collision between cars, *held*, under the evidence, for the jury. *Stanton v. Interstate Chem. Corp.*, 81 S. E. 660, 97 S. C. 408.

#### NUISANCE.

*See Highways; Obstruction On, or Near*. *Setlemeyer v. So. Ry. —Carolina Division*, 81 S. E. 465, 97 S. C. 85.

#### OPTIONS.

1. Must be exercised to affect contract. *Dinkins v. Simons*, 81 S. E. 638, 97 S. C. 26.

#### PARTNERSHIP.

*See Receivers*. *Lyles v. Williams*, 81 S. E. 659, 97 S. E. 378.

#### PAYMENT.

*See Judicial Sales*. *Eleazer v. Shealey*, 81 S. E. 648, 97 S. C. 385.

#### PLEADING.

1. Under Code of Civ. Proc. 1912, sec. 208, providing that, where an answer contains new matter constituting a defense by way of avoidance, the Court may, in its discretion, on defendant's motion, require a reply thereto, the matter of requiring a reply is within the trial Court's discretion. *Powell v. Continental Ins. Co. of City of New York*, 81 S. E. 654, 97 S. C. 289.
2. In an action on a note given for fertilizer which provided that the payee should not be responsible for the results of the fertilizer on the crops, allegations of a counterclaim that defendant purchased the fertilizer on plaintiff's representations that

- it was adapted to cotton, but that it in fact damaged defendant's cotton, were not irrelevant. *Germofert Mfg. Co. v. Castles*, 81 S. E. 665, 97 S. C. 389.
8. Where an entire pleading or part of a pleading setting up a defense consists of irrelevant matter, a general demurrer will lie to it. *Germofert Mfg. Co. v. Castles*, 81 S. E. 665, 97 S. C. 389.
  4. A demurrer to a complaint admits every fact alleged in the complaint and every fact which may be reasonably inferred from those directly alleged. *Simkins v. Western Union Telegraph Co.*, 81 S. E. 657, 97 S. C. 413.
  5. An entire pleading or part of a pleading setting up a defense consisting of irrelevant matter may not be stricken on motion under a statute limiting motions to strike to irrelevant matter contained or inserted in a pleading otherwise good. *Germofert Mfg. Co. v. Castles*, 81 S. E. 665, 97 S. C. 389.
  6. If a pleading is manifestly false and interposed to defeat or delay plaintiff's action, the Court will strike it as "sham;" but a pleading is not sham merely because it is legally insufficient or because it contains inconsistent averments or omits material facts, etc. *Germofert Mfg. Co. v. Castles*, 81 S. E. 665, 97 S. C. 389.
  7. A motion to strike a pleading as sham can only be directed against an entire answer or defense, and an entire answer will not be stricken upon a showing that a separate part of it is sham. *Id.*, 81 S. E. 665, 97 S. C. 389.
  8. A motion to strike a pleading or defense as sham is not regarded favorably and will only be granted where the falsity of the pleading clearly appears. *Id.*, 81 S. E. 665, 97 S. C. 389.
  9. In an action on a note given for fertilizer, held, error to strike as sham a counterclaim alleging that plaintiff represented that the fertilizer was adapted to growing cotton, but that it injured defendant's crop when used thereon. *Id.*, 81 S. E. 665, 97 S. C. 389.
  10. Objections to complaint not raised by demurrer are waived. *Dinkins v. Simons*, 81 S. E. 638, 97 S. C. 261.
  11. Where, in an action on a life policy, defendant pleaded unsound health of insured at the time the policy was issued by reason of tuberculosis, and for that reason the policy was void under a provision that no obligation was assumed thereunder unless insured was in good health at the time the policy was delivered, defendant was confined to the disability pleaded, and could not claim a forfeiture for other reasons. *Ledford v. Metropolitan Life Ins. Co.*, 81 S. E. 497, 97 S. C. 164.
  12. An administrator whose intestate died from injuries negligently caused, cannot, under Code Civil Proc. 218, unite in a single action against the tortfeasor, a cause of action surviving to him for the damages suffered by his intestate with a cause of action under Lord Campbell's Act for the benefit of the kin of said intestate; since the real parties plaintiff in interest, and the elements of damages recoverable, in the two causes of action are different. *Bennett v. Spartanburg etc. Ry.*, 81 S. E. 189, 97 S. C. 24.
  13. The refusal of a motion to require complaint to be made more definite and certain so as to state from what engine or engines the sparks of fire escaped, or whether it was from a freight or passenger train, the direction in which it was going, also what officer or agent of defendant knew or consented to the placing of the property which was destroyed upon its right of way, and when such consent was given, and the particular items of property destroyed and the value of each item, was not an abuse of discretion on part of the trial Court. *Muckenfuss v.*

- A. & C. A. L. R. R. Co.*, 80 S. E. 460, 97 S. C. 46.
14. The complaint merely alleging damage in the sum of \$1,000, and praying judgment for that sum, plaintiff cannot recover interest from the time the claim became payable, and so make the recovery more than \$1,000. *Rawls v. Ins. Co.*, 81 S. E. 505, 97 S. C. 189.
  15. A party to a contract, to recover special damages for a breach thereof, must allege that the adverse party, at the time of making the contract, knew the peculiar circumstances which would give rise to special damages in case of a breach. *Simkins v. W. U. Tel. Co.*, 81 S. E. 657, 97 S. C. 418.
  16. The Court, in determining the sufficiency of the complaint, in an action against a telegraph company for delay in the delivery of a message, causing loss of compensation for professional services, as stating a cause of action for special damages, may consider the message set out in the complaint as read in the light of the attendant circumstances known to the company, as alleged in the complaint. *Id.*, 81 S. E. 657, 97 S. C. 418.
  17. A complaint, in an action against a telegraph company for delay in delivering a message asking plaintiff to go to a designated place and represent the sender before a body, which alleges that plaintiff was an attorney, and was known to the agents of the company, and that the company knew that the sender's purpose was to engage the professional services of plaintiff, and that, because of delay in the delivery of the message, plaintiff could not render the services, and was deprived of a reasonable compensation therefor, states a cause of action, as against a demurrer, for special damages for loss of compensation. *Simkins v. W. U. Tel. Co.*, 81 S. E. 657, 97 S. C. 418.
  18. A telegraph company, when sued for delay in the delivery of

a message, may not complain of the defect in the complaint whereby evidence to prove notice that special damages would result from delay in delivery is set out instead of the allegation of notice. *Simkins v. W. U. Tel. Co.*, 81 S. E. 657, 97 S. C. 418.

### PLEDGES.

1. In a suit to recover a bond and mortgage which plaintiff had assigned to a third person, evidence held to show that the defendant bank, which lent money on the security of the bond and mortgage, was a purchaser in good faith without notice of the agreement between plaintiff and her assignee. *Anderson v. Citizens Bank*, 81 S. E. 158, 97 S. C. 458.
2. In a pledgor's action to redeem and for an accounting, the account rather than the pleadings was the basis for the judgment, since in actions for account, where defendant has all the property and accounts, plaintiff sues because he does not, and is not supposed to, know the amount due. *Haselden v. Hamer*, 81 S. E. 424, 97 S. C. 178.
3. An agreement, providing for a forfeiture of pledged stock upon nonpayment of the secured debt, was void. *Haselden v. Hamer*, 81 S. E. 424, 97 S. C. 178.
4. A pledgee of stock pledged to secure a debt was entitled to possession of the stock until payment of the debt or foreclosure of his lien according to law. *Haselden v. Hamer*, 81 S. E. 424, 97 S. C. 178.
5. A pledgor of stock to secure a debt was the equitable owner thereof, and entitled to all credits from dividends thereon. *Haselden v. Hamer*, 81 S. E. 424, 97 S. C. 178.

### PRACTICE.

1. If a pleading is manifestly false and interposed to defeat or delay plaintiff's action, the Court will strike it as sham, the word "sham" being synonymous with

- "false" and applicable to designate all the pleadings which are in fact false, whether good or bad in substance, but a pleading is not sham merely because it is legally insufficient or because it contains inconsistent arguments or omits material facts, etc. *Germofert Mfg. Co. v. Castles*, 81 S. E. 665, 97 S. C. 389.
2. A motion to strike a pleading as sham can only be directed against an entire answer or defense, and an entire answer will not be stricken upon a showing that a separate part of it is sham. *Id.*, 81 S. E. 665, 97 S. C. 389.
  3. A motion to strike a pleading or defense as sham is not regarded favorably, and will only be granted where the falsity of the pleading clearly appears; its truth or falsity ordinarily being for the jury. *Germofert Mfg. Co. v. Castles*, 81 S. E. 665, 97 S. C. 389.
  4. Where an entire pleading or part of a pleading setting up a defense consists of irrelevant matter, a general demurrer will lie to it, but it may not be stricken on motion under a statute limiting motions to strike to irrelevant matter contained or inserted in a pleading otherwise good. *Germofert Mfg. Co. v. Castles*, 81 S. E. 665, 97 S. C. 389.
  5. Defense of fraud in action for purchase money of fertilizers sold, held to be improperly stricken out as sham under *Germofert Fertilizer Co. v. Castles*, *supra*. *Germofert Mfg. Co. v. Delleney*, 81 S. E. 667, 97 S. C. 395.
  6. Counterclaim in action for purchase money of fertilizers sold, held to be improperly stricken out as sham under *Germofert Fert. Co. v. Castles*, *supra*. *Germofert Mfg. Co. v. Scruggs*, 81 S. E. 667, 97 S. C. 396.
  7. Under Code Civil Procedure 1912, section 208, providing that, where an answer contains new matter constituting a defense by way of avoidance, the Court may, in its discretion, on defendant's motion, require a reply thereto, the matter of requiring a reply is within the trial Court's discretion, which will not be interfered with, in the absence of prejudicial abuse. *Powell v. Ins. Co.*, 81 S. E. 654, 97 S. C. 375.
  8. An action to recover certain real estate and rents and profits against certain defendants, all of whom but one were minors, was instituted March 9, 1889. No guardian *ad litem* was appointed, but a demurrer on the ground that two causes of action were improperly united was sustained November 30, 1891, and plaintiffs were given the right to elect on which cause of action they would go to trial. From 1892, when notice of election was served, until 1912, when a guardian *ad litem* for certain minor plaintiffs was appointed, nothing was done. One of the original plaintiffs died in 1894, after having promised one of defendants that he would abandon the suit. The cause was first docketed in April, 1889, and carried forward from term to term until the October, 1897, term, when it was "stricken off with leave to restore." It did not again appear on the calendar until the April, 1900, term. In April, 1889, a referee was appointed, and in January, 1913, the heirs at law of the deceased plaintiff asked leave to amend the complaint and to serve a supplemental complaint, whereupon defendants moved to dismiss for want of prosecution. Held, that plaintiffs were guilty of inexcusable laches, entitling defendants to a dismissal. *McAuley v. Orr*, 81 S. E. 489, 97 S. C. 214.
  9. An administrator whose intestate died from injuries negligently caused, cannot, under Code Civil Proc. 218, unite in a single action against the tortfeasor, a cause of action surviving to him for the damages suf-

ferred by his intestate with a cause of action under Lord Campbell's Act for the benefit of the kin of said intestate; since the real parties plaintiff in interest, and the elements of damages recoverable, in the two causes of action are different. *Bennett v. Spartanburg etc. Ry. Co.*, 81 S. E. 189, 97 S. C. 27.

10. The refusal of a motion to require complaint to be made more definite and certain so as to state from what engine or engines the sparks of fire escaped, or whether it was from a freight or passenger train, the direction in which it was going, also what officer or agent of defendant knew or consented to the placing of the property which was destroyed upon its right of way, and when such consent was given, and the particular items of the property destroyed and the value of each item, was not an abuse of discretion on part of the trial Court. *Muckenfuss v. A. & C. A. L. R. R. Co.*, 81 S. E. 460, 97 S. C. 46.
11. Denial of motion to set aside a default judgment under Code Civ. Proc., sec. 225, on the ground of mistake or excusable neglect, will not be disturbed, where defendant's claims that the default was due to his bad health and deficient memory, and that he had a good defense against charges made, are not sustained. *Farmers Bank v. Talbert*, 81 S. E. 305, 97 S. C. 74.
12. Where the Court, in stating the issues, misstates them, a party must call its attention thereto at the time, or he cannot complain. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.
13. As to trial of equitable issues. *See Banks v. Frith*, 81 S. E. 677, 97 S. C. 362.

#### PRINCIPAL AND AGENT.

*See Insurance. Powell v. Ins. Co.*, 81 S. E. 654, 97 S. C. 375; *Judicial Sales, Eleazer v. Shealey*, 81 S. E. 648, 97 S. C. 335.

1. A statement of a person that he is the agent of another does not, in itself, prove agency, but is competent as a circumstance, in connection with other evidence, to prove agency. *Watkins v. A. C. L. R. R. Co.*, 81 S. E. 426, 97 S. C. 148.

#### PRINCIPAL AND SURETY.

1. Suretyship is a mixed question of law and fact, evidence being admissible as to the circumstances under which the alleged surety signed to enable the Court to determine whether the relation exists. *Ayer v. Hughes*, 81 S. E. 510, 97 S. C. 255.
2. In an action for partition, in which it is sought to subject an interest descended to heirs to the *pro tanto* payment of a mortgage executed by the ancestor, evidence held not to show that the ancestor signed the mortgage as surety for certain persons, but to show that she signed it only for her son. *Ayer v. Hughes*, 81 S. E. 510, 97 S. C. 255.
3. The release by a mortgagee or payee of one of the several makers of a bond and mortgage, or the material alteration of the bond by the payee, will release a surety thereon, where he did not consent thereto. *Ayer v. Hughes*, 81 S. E. 510, 97 S. C. 255.
4. A surety is not discharged by the release to and for him, or with his consent, of a person liable on the instrument. *Ayer v. Hughes*, 81 S. E. 510, 97 S. C. 255.
5. A surety for the payment of a mortgage debt would be only liable for one-eighth of the debt where the principal only had a one-eighth interest in the mortgaged property, though there were only five of the mortgagors, including such surety. *Ayer v. Hughes*, 81 S. E. 510, 97 S. C. 255.
6. The property of one of several mortgagors will not be applied to the payment of the mortgage debt before the property of the



surety of another of the mortgagors, where the first mentioned mortgagor has not imposed such a prior liability upon his property, by contract or otherwise. *Ayer v. Hughes*, 81 S. E. 510, 97 S. C. 255.

### RAILROADS.

*See Carriers; Damages; Mandamus; Street Railroads.*

1. Act February 16, 1912 (27 St. at Large, p. 791), authorizing the railroad commission to regulate and control the manner in which a street may cross any railroad track, is not retroactive, and hence does not apply to a crossing made before its enactment. *Richards v. Southern Ry. Co.*, 81 S. E. 814, 97 S. C. 77.
2. The State Railroad Commission only has those powers given to it by statute, and hence, in absence of statute, could not require a city to submit plans for safeguarding a dangerous crossing. *Richards v. Southern Ry. Co.*, 81 S. E. 814, 97 S. C. 77.
3. The kind of crossing and safeguards which may be required under Act February 16, 1912 (27 St. at Large, p. 791), authorizing the railroad commission to regulate the manner in which a street may cross a railroad track, is in the discretion of the commission. *Id.*, 81 S. E. 814, 97 S. C. 77.
4. A complaint for personal injuries to plaintiff, which alleged that he was struck by a railroad train while at a traveled place, held, when construed liberally, as required by Code Proc. sec. 209, to state a cause of action, under the crossing signal act (Civ. Code, secs. 3222, 3230). *Sanders v. Southern Ry. Co.—Carolina Division*, 81 S. E. 786, 97 S. C. 423.
5. One injured walking along a path on a railroad right of way cannot recover under Civ. Code, secs. 3222, 3230, requiring signals before crossing a traveled place, where the only evidence of the right to use such path was that the public had used it for more than 20 years. *Sanders v. Southern Ry. Co.—Carolina Division*, 81 S. E. 786, 97 S. C. 423.
6. Notwithstanding that the charter of an interurban electric railway company, granted under the general law, provided that it should be subject to all of the liabilities of railroad corporations embraced in the general railroad law (Civil Code 1902, secs. 2024-2210), section 2182, requiring the ringing of a bell or blowing of a whistle 500 yards from a public highway crossing, and that the bell be kept ringing until the engine crossed the highway, would not be applicable to electric railroads. *Campbell v. Greenville etc. Ry. Co.*, 81 S. E. 676, 97 S. C. 388.
7. *See Fires. Muckenfuss v. A. & C. A. L. R. R. Co.*, 80 S. E. 460, 97 S. C. 46.

### RECEIVERS.

1. Where defendant diverted collections made upon securities belonging jointly to himself and plaintiff and assigned as collateral, plaintiff's right to have a receiver appointed is not lost because defendant subsequently paid the debt from funds collected from other sources. *Lyles v. Williams*, 81 S. E. 659, 97 S. C. 373.

### RECORDING ACTS.

1. Assignment of a chose in action is not within the recording acts, and is valid though not recorded. *Carolina Nat'l Bank v. Greenville*, 81 S. E. 634, 97 S. C. 291.
2. Where the owner of a nonnegotiable bond and mortgage assigned it, the assignment being recorded, a bona fide purchaser without notice from the assignee is protected; the mortgagee being estopped to assert her rights. *Anderson v. Citizens Bank*, 81 S. E. 684, 97 S. C. 453.

### RECOVERY OF REAL PROPERTY.

1. In action to recover possession of undivided interest in lands

- which plaintiff claimed as the heir of his mother, evidence held sufficient to go to the jury on the questions whether plaintiff was the legal heir of his mother, and whether defendant was estopped from disputing plaintiff's title. *Maples v. Spencer*, 81 S. E. 483, 97 S. C. 331.
2. The testimony tending to show defendants claimed title from a common source with, but adversely to, plaintiffs, the issue as to adverse possession was properly submitted to the jury. *Dunlap v. Robinson*, 81 S. E. 428, 97 S. C. 79.
  3. Possession held necessary to maintain action for trespass, in absence of proof of legal title. *Nicholson v. Villepigue*, 81 S. E. 494, 97 S. C. 130.
  4. The Supreme Court, on appeal from an order of nonsuit at the close of plaintiff's case, had no jurisdiction to determine the facts in action for recovery of real property so as to conclude the Court on a new trial. *Nicholson v. Villepigue*, 81 S. E. 494, 97 S. C. 130.
  5. Whether the plaintiff, in an action for damages for unlawful entry on land, and to recover possession, ever had possession of the land was a question for the jury to determine. *Id.*, 81 S. E. 494, 97 S. C. 130.
  6. The plaintiff, in an action for unlawful entry on land, and for possession, wherein a general denial was interposed, was put upon proof of his possession, and, if he failed to prove that he ever had possession, the possession of the defendant required him to show title in order to recover. *Id.*, 81 S. E. 494, 97 S. C. 130.
  7. An exception to an instruction, in an action for unlawful entry on land, and for possession, that plaintiff introduced the same proof as upon a former trial, could not be sustained on the ground that plaintiff did not introduce a tax deed that he had introduced on the former trial, where such deed was introduced by the defendant, and was before the jury. *Id.*, 81 S. E. 494, 97 S. C. 130.
  8. The defendant, in an action for unlawful entry on land, and for possession, who interposed a general denial, was entitled to rely on the defense that plaintiff failed to prove that he ever had possession, and that the tax deed under which he claimed was void, and did not cover the land in dispute. *Id.*, 81 S. E. 494, 97 S. C. 130.
  9. The failure of the Court to construe deeds in the chain of title of the plaintiff, in an action for unlawful entry on land, and for possession, was not error, where it did not appear that such construction was necessary, and it was not requested. *Id.*, 81 S. E. 494, 97 S. C. 130.
  10. Whether a sheriff's deed, under which the plaintiff, in an action for unlawful entry on land, and for possession, claimed title, covered the land in dispute was for the jury, where there was a question whether the land was covered by such deed. *Id.*, 81 S. E. 494, 97 S. C. 130.
  11. That the deed to the grantor of the plaintiff, in an action for unlawful entry, and for possession, may have conveyed only a life estate did not necessarily require a judgment for defendant on plaintiff's death and the substitution of his heirs, where there was no evidence of the death of plaintiff's grantor, since plaintiff's estate would last during his grantor's life. *Id.*, 81 S. E. 494, 97 S. C. 130.
  12. Where a devisee in remainder in fee accepted deeds from the life tenant, or from a grantee of the life tenant, which conveyed to him an estate for life with remainder to his wife for life, with remainder to their issue, subject to the provision that all interest of any beneficiary should be invalidated by any threatened levy to satisfy any debt against any of the beneficiaries, the question whether the devisee claimed under the will or under

the deeds was one of fact for the jury. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.

18. The statute limiting the time in which an action may be brought for fraud does not limit the time in which one may defend against a deed procured by fraud. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.
14. Where the issue was whether a wife derived a life estate under a deed to her husband for life, with remainder to her for life, with remainder over to their issue, the error in a charge that the wife did not obtain a life estate until after her husband's death, and that the undisputed proof was that she died first, because on the facts in violation of Const., art. V, sec. 26, was not prejudicial. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.

#### RES JUDICATA.

1. Where, in a suit by creditors to set aside a mortgage as fraudulent, and for the appointment of a receiver, etc., the referee advised a sale of the property, an order directing its sale was *res judicata*, if there was no appeal from the order. The propriety of the order could not be reconsidered in the absence of a change of conditions, such as payment or arrangement of outstanding debts. *Virginia-Carolina Chem. Co. v. Hunter*, 81 S. E. 190, 97 S. C. 81.
2. *See, also, Judgment. Middleton v. Denmark Ice & Fuel Co.*, 81 S. E. 157, 97 S. C. 457.

#### SALES.

1. *See Timber. Midland Timber Co. v. Prettyman*, 81 S. E. 484, 97 S. C. 247.
2. *See Judicial Sales. Smith v. Smith*, 81 S. E. 499, 97 S. C. 242; *Eleazer v. Shealey*, 81 S. E. 648, 97 S. C. 335.
3. *See Tax Sales. Nicholson v. Villepigue*, 81 S. E. 494, 97 S. C. 130.

#### SCHOOLS.

1. While the child of a white person and one having less than

one-eighth negro blood is entitled to exercise the rights of a white man, in view of Const., art. III, sec. 33, authorizing the marriage of such persons, school trustees, under Civil Code 1912, sec. 1761, subd. 8, providing that the trustees shall have authority and it shall be their duty to suspend or dismiss pupils when the best interest of the schools make it necessary, may, upon providing a school for children of this class, distinct from both the white and negro schools, suspend such child from the white schools when for the best interest of the other white pupils, who would be withdrawn if it was allowed to remain, notwithstanding section 1780, declaring that it shall be unlawful for pupils of one race to attend the schools provided for another, and Const., art. II, sec. 7, providing for separate schools for whites and negroes. *Tucker v. Blease*, 81 S. E., 668, 97 S. C. 303.

#### SLANDER.

*See Libel and Slander. Smith v. Brown*, 81 S. E. 638, 97 S. C. 239.

#### SPECIFIC PERFORMANCE.

1. A judgment granting specific performance of an option contract to purchase real estate, and directing a sale to pay the amount due the vendor, affirmed by an equally divided Court. *Dinkins v. Simons*, 81 S. E. 638, 97 S. C. 261.

#### STATUTES.

(*See Reference to Statutes Cited by Court, following Table of Cases Cited.*)

1. A railway employee, who is within the Federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stats., 65 U. S. Comp. St. Supp., 1911, p. 1322), while actually engaged in relaying rails on a line of railway is also within the act while asleep at night in a shanty car of a train on a sidetrack, placed there for

- the accommodation of such employees, and he may recover for injuries sustained in consequence of the shanty car being struck by another train. *Sanders v. C. & W. C. Ry Co.*, 81 S. E. 288, 97 S. C. 50.
2. Under Laws 1910, p. 948, sec. 7, empowering the commission, provided for improving roads of Marion county, to condemn, "provided, that where lands are condemned, the damage shall be fixed as now provided by law," the damages are to be fixed by the county board as theretofore. *Johnson v. Road & Highway Com.*, 81 S. E. 502, 97 S. C. 205.
  3. Whether the commission for improving roads in Marion county is proceeding to build a new road or relocate an old road is immaterial; Laws 1910, p. 948, secs. 5, 7, empowering it to do both. *Ib.*, 81 S. E. 502, 97 S. C. 205.
  4. The action being merely to enjoin the commission of Marion county from opening a new road, the purpose or right of the commission to abandon part of an old road is not before the Court. *Ib.*, 81 S. E. 502, 97 S. C. 205.
  5. The act (Acts 1910, p. 945) entitled "An act to authorize the county of Marion to issue bonds for permanent road and highway improvements, and to provide for the expenditure of the same," providing for improvement of public highways in the county, has but a single purpose, sufficiently set forth in the title within Const., art. 3, sec. 17. *Ib.*, 81 S. E. 502, 97 S. C. 205.
  6. Under Criminal Code 1912, sec. 492, providing that any person who shall contract with another to render personal services, and shall thereafter fraudulently or with malicious intent fail or refuse to render such service, shall be guilty of a misdemeanor, section 494, making the breach *prima facie* evidence that the violation was fraudulent and malicious, and section 497, providing that the contract may be verbal or in writing, and, if in writing, it shall be witnessed by one or more disinterested persons, and, if verbal, by at least two disinterested witnesses, not related by blood or marriage within the sixth degree to either party, where the warrant does not allege and the proof does not show whether the contract was verbal or in writing, or whether it was witnessed, a conviction cannot be predicated thereon. *State v. Williams*, 81 S. E. 154, 97 S. C. 449.
  7. Criminal Code 1912, sec. 84, providing that objections to any indictment for defects apparent on the face thereof must be taken by demurrer or motion to quash before the jury is sworn, does not apply to magistrate's Courts. *State v. Williams*, 81 S. E. 154, 97 S. C. 449.
  8. A Judge has no power at chambers, without the consent of all the parties, to correct the judgment of a Court (Civil Code 1912, sec. 2838). *Middleton v. Denmark Ice & Fuel Co.*, 81 S. E. 157, 97 S. C. 457.
  9. An administrator whose intestate died from injuries negligently caused, cannot, under Code Civil Proc. 218, unite in a single action against the tortfeasor, a cause of action surviving to him under Civil Code, sec. 2963, for the damages suffered by his intestate with a cause of action under Lord Campbell's Act, Civil Code, sec. 3955, for the benefit of the kin of said intestate; since the real parties plaintiff in interest, and the elements of damages recoverable, in the two causes of action are different.
  10. Act February 16, 1912 (27 Stat. at Large, p. 791), authorizing the railroad commission to regulate the manner in which a street may cross a railroad track, is not retroactive, and does not apply to a crossing made before its enactment. *R. R. Comrs. v. So. Ry. Co.*, 81 S. E. 314, 97 S. C. 77.
  11. The kind of crossing and safeguards which may be required

under act of February 16, 1912 (27 St. at Large, 791), authorizing the railroad commission to regulate the manner in which a street may cross a railroad track, is in the discretion of the commission. *R. R. Comrs. v. So. Ry. Co.*, 81 S. E. 314, 97 S. C. 77.

### STREET RAILROADS.

1. Evidence that it was the custom of motormen to eat their meals while running the car was admissible on the question of wanton negligence in not having a proper headlight, etc., though the complaint did not allege negligence by the motorman in eating while on duty. *Kirkland v. Augusta-Aiken Ry. & Electric Corporation*, 81 S. E. 306, 97 S. C. 61.
2. Evidence held to make it a question for the jury whether the street car company was guilty of wanton negligence in not having a proper headlight. *Kirkland v. Augusta-Aiken Ry. & Electric Corporation*, 81 S. E. 306, 97 S. C. 61.
3. Though the charter of an inter-urban electric railway company subjected it to all the liabilities of railroad corporations under the general railroad law (Civ. Code 1902, secs. 2024-2210), the requirement of section 2132 as to ringing of a bell or blowing of a whistle at a public highway crossing, etc., would not be applicable to electric railroads. *Campbell v. Greenville, S. & A. Ry. Co.*, 81 S. E. 676, 97 S. C. 383.

### TAX SALES.

1. Possession necessary to complete. *Nicholson v. Villepigue*, 81 S. E. 494, 97 S. C. 130.

### TELEGRAPHS AND TELEPHONES.

*See Appeal and Error.*

1. The Court, in determining the sufficiency of the complaint, in an action against a telegraph company for delay in the delivery of a message, may consider

the message set out in the complaint, as read in the light of the circumstances known to the company, to determine whether it states a cause of action for special damages. *Simkins v. Western Union Telegraph Co.*, 81 S. E. 657, 97 S. C. 413.

2. A complaint, in an action for delay in the delivery of a message, which alleges that plaintiff was an attorney known to the agents of the telegraph company, and that the company knew that the sender's purpose was to engage the professional services of plaintiff, and that, because of the delay in the delivery of the message, he could not render the services and lost a fee, states a cause of action for special damages for the delay. *Id.*, 81 S. E. 657, 97 S. C. 413.
3. Damages for nondelivery of message. *See Damages. Bethea v. Western Union Tel. Co.*, 81 S. E. 675, 97 S. E. 385.
4. The disclosure by a telegraph operator of the contents of a message addressed to plaintiff, with reference to rates of premium charged by a surety company on the bonds of a public officer, does not justify the imposition of punitive damages on the telegraph company, there being a total absence of testimony showing the disclosure to be wilful. *Purdy v. W. U. Tel. Co.*, 80 S. E. 439, 97 S. C. 22.

### TENDER.

1. Where a note and mortgage, providing for attorney's fees if placed in the hands of attorneys for collection, were placed in attorney's hands before the date to which the time of payment had been extended and before such date the amount due was tendered, a Court of equity which has control of such contracts for attorney's fees would deny a recovery of such fees. *Taylor v. King*, 81 S. E. 172, 97 S. C. 477.
2. Where a mortgagee refused a tender because he thought a

year's interest had not been paid, he could not afterwards attack the sufficiency of the tender because of a slight deficiency in the amount tendered. *Taylor v. King*, 81 S. E. 172, 97 S. C. 477.

3. A mortgagee could not recover interest, cost, and attorney's fees, notwithstanding his refusal to accept a valid tender, because of the failure of the mortgagor's agent to date a credit on the note, as it was his own duty to enter the credits on the security of which he had possession, which obligation was not changed by allowing the mortgagor's agent to do it, especially where it did not appear that the tender would have been accepted if the credit had been dated. *Taylor v. King*, 81 S. E. 172, 97 S. C. 477.

#### TIMBER AND TIMBER RIGHTS.

1. Where a timber deed gave to the grantee 10 years in which to cut and remove timber, and provided that in case the timber was not cut and removed before the expiration of such period the grantee should have such additional time as it might desire, but that in such event it should during such extension period, pay interest on the original purchase price annually in advance, the right to an extension was not conditioned upon the commencement of the cutting and removal within the first 10-year period. *Midland Timber Co. v. Prettyman*, 81 S. E. 484, 97 S. C. 247.
2. Under such deed, the grantee was entitled to such an extension of time for cutting and removing the timber as it desired, and not merely to a reasonable time, since the deed was unambiguous and express, and as so construed not invalid. *Midland Timber Co. v. Prettyman*, 81 S. E. 484, 97 S. C. 247.
3. A grant of standing timber with the usual easements relating thereto, and the grant of a per-

manent and exclusive right of way for a permanent railroad or tramway, may properly be made in the same instrument. *Midland Timber Co. v. Prettyman*, 81 S. E. 484, 97 S. C. 247.

4. Under a timber deed providing that the grantee should have 10 years in which to cut and remove the timber, and that in case it was not cut and removed within such time, it should have such additional time therefor as it might desire, by paying annual interest on the original purchase price, drawn on a printed blank from which the provision relating to the commencement of the cutting and removal was stricken out, a further provision that the timber cut by the grantee for the purpose of opening, clearing, building, and constructing the railroads, tramways, etc., therein provided for, should not affect the time granted for cutting and removing the timber did not in any way limit the right to an extension of time, especially as it should be rejected as surplusage if, as was apparently the case, it was inadvertently left in the deed. *Midland Timber Co. v. Prettyman*, 81 S. E. 484, 97 S. C. 247.

#### TRIAL.

*See Criminal Law; Damages; Evidence; Nonsuit; Verdict; Practice; Venue; Charge to Jury.*

#### VENUE.

1. Where, in an action to recover for the unlawful detention of a mule, plaintiffs allege a sale to S., and the taking of a chattel mortgage, and a sale by S. to B., both of whom were residents of B. county, and that thereafter defendant V., as agent of defendant bank, both being non-residents, took possession of the mule, defendants S. and B. were not mere nominal parties to the action which was properly brought in B. county under Code Civ. Proc. 1912, sec. 174. *Jones Bros. v. Strickland*, 81 S. E. 792, 97 S. C. 444.

2. Waiver of objection to wrong place of trial. *Rogers v. Townes*, 81 S. E. 278, 97 S. C. 56.

### VERDICT.

1. The fact that the verdict did not contain an express finding for plaintiff for actual damages, but merely awarded a certain sum as "punitive damages," was a mere irregularity, where there was evidence of actual damage, which was waived by appellant's failure to object thereto until the jury were separated. *Bethea v. Western Union Telegraph Co.*, 81 S. E. 675, 97 S. C. 385.
2. Where the testimony of plaintiff that it is a holder for value in due course of business before maturity of a negotiable instrument, without notice of any fraud or infirmity affecting it, is undisputed, and only one inference can be drawn therefrom; verdict was properly directed in its favor. *New England Nat'l Bank v. Wallace*, 80 S. E. 460, 97 S. C. 52.

### WAIVER.

See *Estoppel. Powell v. Ins. Co.*, 81 S. E. 278, 97 S. C. 375.

1. Of objection to jurisdiction. *Rogers v. Townes*, 81 S. E. 278 97 S. C. 56.

### WATERS.

1. A complaint alleging the destruction of plaintiff's crops through flooding caused by the negligent construction of a railroad in not providing means sufficient to drain water from the land in the vicinity, but from which it appears that it was the surface water, and not the water from any natural watercourse, which caused the damage, does not state a cause of action.

*Cannon v. A. C. L. R. R. Co.*, 81 S. E. 476, 97 S. C. 238.

2. An allegation that ditches obstructed by the construction of a railroad had been used to drain the lands occupied by plaintiff for more than 20 years is not sufficient to establish a prescriptive right to the use of such ditches without an allegation that the user was adverse. *Cannon v. A. C. L. R. R. Co.*, 81 S. E. 476; 97 S. C. 238.

### WILFULNESS.

1. Wilfulness is a conscious realization of wrongdoing. Charge not objectionable as justifying the belief by the jury that the same evidence warranted a finding of both negligence and wilfulness. *Settlemyer v. So. Ry. —Car. Division*, 81 S. E. 465, 97 S. C. 85.

### WILLS.

1. Testator devised land to a niece and nephews, and gave to two brothers and a sister "and to the male issue of their bodies" his other lands, and declared that the other lands should not be sold out of the family, but permitted a sale by a devisee to either of the other devisees at a specified sum, and directed that a devisee purchasing the share of another devisee should take subject to the same limitations, and provided that the daughters of the brothers should receive at the death of the brothers shares out of the personal estate, to equalize them for the land devised to the male issue of the brothers. *Held*, that the sister took a life estate, with remainder in fee to her male issue. *Cannon v. Baker*, 81 S. E. 478, 97 S. C. 116.

















